DOCKET NO. SC-2022-0719

IN THE SUPREME COURT OF ALABAMA

SPRINGHILL HOSPITALS, INC., d/b/a SPRINGHILL MEMORIAL HOSPITAL,

Appellant,

v.

PATRICIA BILBREY WEST, as Administratrix and Personal Representative of the Estate of JOHN DEWEY WEST, JR., Deceased,

Appellee

APPEAL FROM THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA CIVIL ACTION NO. CV-2016-901045

BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

On June 4, 2014 John Dewey West, Jr. ("Jay" or "Mr. West") drove himself to the emergency room at Springhill Memorial Hospital in Mobile ("SMH") for treatment of a table saw injury to the tip of his left thumb following an incident at work.

Jay never left the hospital. Fourteen hours after walking in he lay dead from receiving too much IV opioid pain medication in direct violation of his doctor's orders. The root cause of this medication error was SMH's years-long decision to ignore IV opioid pain medication safety. SMH's failure to act to protect its patients set in motion the events that ultimately resulted in a new untrained nurse administering Jay an "egregious," "excessive," "ridiculous," "unacceptable" amount of IV Dilaudid that would impair his ability to breathe, cause his heart to go into an arrythmia and kill him.

It took Jay's widow, Patricia ("Mrs. West") *seven years* to bring her husband's wrongful death case to trial.[1] Twenty-seven witnesses[2]

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[1] The Mobile Circuit Court case action summary reflecting SMH's defend-at-all-costs strategy is 56 pages long and found in the record at C. 2-57.

[2] A roster of all the witnesses who testified is provided for the

testified over two weeks,[3] Plaintiff's expert witnesses included some of this country's foremost medical experts on the issues of the duties owed by hospitals, their managers and their nurses relative to patient safety when administering opioids for pain management following surgery.

Among the more powerful comments the jury heard and considered were these:

- From the Mobile orthopedic surgeon who repaired Mr. West's thumb, John McAndrew, MD:

  Q: So within twelve hours of the time of his surgery, you're expecting to see him. And your plan is, as you've told me, to discharge him that day, correct?

  A: Yes, sir.

  Q: Did you ever, in a million years, expect that he was going to be dead when you walked into that room?

  A: No, sir.

R. 1670.

- From the country's foremost IV opioid hospital patient safety expert, Kenneth Rothfield, MD:

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convenience of the Court as Appendix Exhibit A.

[3] The 11-day trial transcript consists of 2,485 pages. R. 585 (opening statements) through R. 3069 (verdict).

> …[t]his is the most egregious overdose I've seen in the most unsafe setting I have ever seen of any case I've ever reviewed.

R. 890-891.

- From SMH's former Chief of its Medical Staff, Mobile ENT surgeon,

  James Spires, MD:

  > "I would never give a dose [of Dilaudid] like that," as it would be "five to six times the amount of medication [I have] ever given a patient."

R. 1736-1737.

- From Plaintiff's nursing expert, Barbara Levin, RN:

  > This was an "outrageous amount of medication" and an "egregious and gross violation of the standard of care."

R. 1535-1536.

Springhill didn't defend this case at trial by claiming it owed no duties of care or that the evidence didn't support Plaintiff's claims that it breached the duties owed; rather, it defended on *causation* claiming Mr. West had a large heart ("cardiomegaly") and some arterial blockage ("stenosis") that caused him to coincidently have a sudden cardiac arrythmia that was completely unrelated to the gross amount of IV Dilaudid he received and it was "just his day to die." Now, in seeking a new trial, SMH, through new appellate counsel, does not really challenge

Plaintiff's evidence of the duties owed, or breaches of those duties, or even causation; instead, SMH argues only that it did not receive a fair trial because of a couple of adverse evidentiary rulings. SMH also contends the jury's verdict, as already substantially remitted by the circuit court, nevertheless still punishes it too much for killing Mr. West.

What is most remarkable about SMH's appellate strategy is how it never meaningfully confronts the circuit court's conclusions about the sufficiency of the evidence and fairness of the trial in its 22-page order on Defendant's post-judgment motions.[4] This case was tried before Mobile Circuit Judge (and veteran former defense attorney) S. Wesley Pipes. Judge Pipes' order, which is essentially ignored by SMH and its *amici*,[5] makes several material observations which will guide this Court's review:

- **As To The Overall Conduct Of The Trial:**

> …The Court, through pre-trial arguments and eleven days of trial, heard all of the arguments of counsel, the testimony of each witness, reviewed each exhibit, and observed the candor

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[4] The post-judgment order (C. 4348-4369) is attached for the Court's convenience as Appendix Exhibit B.

[5] Amicus briefs were filed in support of SMH's contentions by the Business Council of Alabama ("BCA"), Alabama Civil Justice Reform Committee ("ACJRC"), Alabama Hospital Association ("AHA") and Alabama Nurses Association ("ANA").

and demeanor of the witnesses, the Parties and their counsel. The Court also presided over jury selection and observed the conduct, attentiveness, demeanor, and participation of the jurors in voir dire and at trial. The decisions set forth herein are based upon these personal observations, the briefs and argument counsel, and the law and the evidence presented to the jury and Court at trial and in these post-trial pleadings.

C. 4348.

- **As To SMH's Two Grounds For JML:**

In sum, there is substantial evidence that SMH breached its duty to exercise the degree of reasonable care, skill, and diligence ordinarily exercised by similarly situated health care providers in the same or similar circumstances, and that John Dewey West, Jr., was probably caused to die as a proximate consequence of the breaches by the Defendant of those applicable standards of care. As such, and for the other reasons set forth in Plaintiff's opposition briefs, SMH's renewed motion for judgment as a matter of law pursuant to Rule 50 is DENIED.

C. 4352.

- **As To SMH's New Trial Issues:**

… This Court's pre-trial rulings and its rulings made during trial were, in retrospect and considering the law, facts and arguments, correct. Further, SMH's briefs fail to show how each and every alleged error was timely and adequately raised with requisite specificity and was thereby preserved for review. Finally, SMH has failed to demonstrate how any one or more of these issues could be deemed to warrant the extraordinary relief of a new trial in the face of Alabama's harmless error rule. Ala. R. Civ. P. 61.

> With regard to all of these issues, the Court is convinced the Parties received a fair and impartial trial. The jury was selected from a panel of fifty citizens of Mobile County and represented an accurate cross section of the County's demographics. No allegation is made of any impropriety regarding the jury's selection, nor is there any allegation of any individual juror's misconduct. The jury instructions were, for a case of this magnitude and complexity, fairly simple and no objection was made to the charge by either Party. Both Parties were represented by exceptional lawyers who zealously and skillfully advocated for their clients. The Parties, their counsel, and their respective support teams and staff were treated with respect and consideration throughout a very long and arduous trial. Though not relevant to these new trial issues, the Court notes that it extended several scheduling courtesies to SMH with its witnesses, that it overruled several of Plaintiff's objections, and that it sustained several of SMH's objections throughout the course of trial. The Court's rulings were evenhanded.

C. 4354.

- **As To Remittitur:**

> As noted earlier, the Court observed the demeanor, participation, attentiveness, and other attributes of the jurors during voir dire and trial. Defendant alleges no juror misconduct, and none was observed by the Court. Instead, the jury appeared to be attentive, patient, and interested. They were calm and deliberate, and treated the case with the solemnity and respect it deserved. It did not appear that the jury was partial to one side or the other, or that sympathy, bias, passion, prejudice, corruption, or any other improper motive influenced the jury in their deliberation or arriving at the verdict and award.

C. 4355.

Judge Pipes' post-judgment order is eminently fair and just. The trial as conducted was eminently fair and just. While Mrs. West does not agree with the remittitur of the jury's verdict, we could not contend in any cross-appeal that the circuit court's reasoning was unfair or unjust, so the judgment, as remitted, is in Mrs. West's view also fair and just.

Accordingly, oral argument is not requested. SMH received a fair trial. The remitted judgment is fair and just. And Mrs. West has already suffered long enough for the wrongful death of her husband eight long years ago.

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STATEMENT OF JURISDICTION

Mrs. West agrees this Court has jurisdiction pursuant to §§ 12-2-7 and 12-22-2, Ala. Code 1975.

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE

A. Nature Of The Case.

This is an action under the Alabama Medical Liability Act where on February 20, 2022, a duly comprised Mobile County jury returned a unanimous $35 million verdict against SMH for causing the wrongful death of John Dewey West, Jr. C. 2563.

B. Course Of Proceedings And Disposition Below.

SMH sought post-judgment relief: C. 2594-2618 (motions), C. 2783-2886 (brief), C. 3832-3840 (reply brief) to which Mrs. West responded: C. 2901-3004 (brief), C. 3858-3866 (sur-reply brief). On June 16, 2022 Judge Pipes conducted a post-judgment hearing, R. 3133-3370, and on June 27, 2022 entered a comprehensive order denying SMH's motions for judgment as a matter of law and new trial but granting SMH's alternative motion for remittitur. C. 4348-4369.

C. SMH's Non-compliance With Rule 28(a)(5).

Rule 28(a)(5) requires an appellant to "identify the adverse ruling or rulings from which the appeal is taken and asserted as error on appeal, with a reference to the pages of the record on appeal at which the adverse

ruling or rulings can be found."[6] SMH's blue brief – just like its post-judgment briefing – does not, as found by the circuit court (C. 4353), demonstrate where SMH adequately raised and preserved each of the issues it now asserts.

SMH's Statement of the Case fails to point to specific adverse rulings and corresponding pages of the record relative to its claimed evidentiary errors even though the circuit court expressly admonished SMH to do so:

> And this is across the board on these motions to exclude experts and/or the motions in limine.
>
> Keep in mind, these are just pretrial motions. We're all guessing at what may or may not be said, that kind of thing. This completely leaves the door open for objections at trial if either party feels like we are going into issues that either a witness is not qualified to give an opinion on, relevancy, all that kind of stuff.

R. 100.

Likewise, nowhere does SMH demonstrate where it filed a motion

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[6] The corresponding Committee Comment to Rule 28(a)(5) states:

> Rule 28(a)(5) has been amended to require that the appellant's brief in civil cases cite all adverse rulings from which the appeal is taken and include references to the record on appeal where those adverse rulings can be found.

in conformance with Ala. R. Civ. P. 7(b)(1) prior to verdict to alert the circuit court of any constitutional challenge to former § 6-5-547, just as it fails to demonstrate it timely complied with the requirement of § 6-6-227 regarding service of written notice upon the Attorney General.

SMH's Statement of the Case also disregards other important orders materially impacting its arguments such as the June 27, 2022 post-judgment order granting Mrs. West's motion to strike relative to SMH's reliance on the testimony of Dr. John Downs and Gayle Nash. C. 4346-4347. Despite these rulings adverse to SMH (thereby precluding its use of excerpts from Dr. Downs' or Nurse Nash's pretrial deposition testimony for any purpose), SMH nevertheless now relies upon those same stricken excerpts in arguing for reversal of the judgment.

These omissions by SMH require Mrs. West to set the record straight.

STATEMENT OF THE ISSUES

1. Whether, as found by the circuit court, substantial evidence supports the verdict returned by the jury?
2. Whether, as found by the circuit court, SMH failed to properly raise and preserve one or more of the new trial issues about which it now

complains, whether the circuit court correctly ruled on each of those new trial issues and whether any ruling, if erroneous, was so consequential as to require a new trial given the harmless error rule?

3. Whether SMH's failure to object to the oral charge to the jury preserved any JML or good count/bad count issues?

4. Whether the judgment as remitted punishes SMH too severely for causing Jay West's wrongful death?

STATEMENT OF THE FACTS

A. SMH's Non-compliance With Rule 28(a)(7) .

Rule 28(a)(7) requires presentation of "[a] full statement of the facts relevant to the issues presented for review" and those facts "must be stated accurately and completely." Unfortunately, SMH's blue brief also fails to comply with these requirements. Nowhere does it recite the facts or inferences which could have been found by the jury. Instead, it cherry picks facts favorable to its contentions and disregards facts undermining its contentions.[7] Mrs. West must therefore again set the record straight.

[7] SMH's Statement of Facts cites 79 times to the testimony of witnesses. However, more than half those citations are to SMH's favorable evidence, i.e., its direct examination of its witnesses and cross-

B. SMH Knowingly Ignores IV Opioid Patient Safety.

Hydromorphone (brand name Dilaudid) is an opioid narcotic pain medication which carries an FDA-Mandated **BLACK BOX WARNING** due to its potentially deadly side effect of causing Opioid Induced Respiratory Depression ("OIRD") and cardiac arrest. The usual starting dose for an opioid naïve patient is 0.2 to 1 mg every 2 to 3 hours. PX 223.[8]

Certain characteristics and medical conditions place some patients who receive Dilaudid and/or other opioids at a higher risk for oversedation and/or respiratory depression which may lead to respiratory arrest and death. High-risk patients include those who are postoperative and/or have other recognized risk factors such as obstructive sleep apnea syndrome, morbid obesity, snorers, and those who are opioid naïve. R. 927-928, 969-970.

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examination of Plaintiff's witnesses. This slanted recitation of only bits and pieces of evidence supporting its contentions is in derogation of Rule 28(a)(7) and the requirements of the standard of review that all evidence and inferences be viewed in the light most favorable to the verdict winner.

[8] Attached for the Court's convenience as Appendix Exhibit D is an index referencing Plaintiff's trial exhibits.

During the twenty-five years prior to Mr. West's visit to SMH in June of 2014, the national medical community, hospital organizations, patient safety organizations, nursing organizations, and other types of medical publications repeatedly educated, warned, and instructed hospitals to take safety precautions to protect their patients (especially high-risk patients) from suffering serious harm or death from IV opioids. The jury was presented with a mountain of medical literature regarding IV opioid patient safety dating back as far as 1989. For instance:

- 1989 - The Institute for Safe Medication Practice ("ISMP") recognized opiates on its very first list of high-alert medications. PX 252.

- 1994 - PASERO OPIOID-INDUCED SEDATION SCALE was created to help recognize the characteristics of patients suffering from opioid induced sedation and respiratory depression. PX 281.

- 2005, 2007, 2012, 2014 – ISMP's List of High Alert Medications. PX 251.

- 2007 - ISMP published a Medication Safety Alert: Reducing Patient Harm from Opiates, stating that, "[M]orphine and hydromorphone are still among the most frequent high-alert medications to cause patient harm." PX 252.

- 2007 – Journal of the Anesthesia Patient Safety Foundation - Dangers of Postoperative Opioids. PX 291.

- 2009 – Journal of PeriAnesthesia Nursing - Assessment of Sedation During Opioid Administration for Pain Management. PX 286.

- 2011 - Anesthesia Patient Safety Foundation issues "Important Patient Safety Recommendations" for postoperative patients receiving IV Opioids. PX 297; R. 775, 2872.

- 2011 – Anesthesia Patient Safety Foundation – No Patient Shall be Harmed by Opioid-Induced Respiratory Depression. PX 297.

- 2011 - American Society for Pain Management Nursing - Nursing Guidelines on Monitoring for Opioid Induced Respiratory Depression. PX 277.

- 2011 – American Nurse Today – Improving Outcomes in Med-Surg Patients with Opioid-Induced Respiratory Depression. PX 275.

- 2011 – Pain Management Nursing –Risk Factors for Opioid-Induced Excessive Respiratory Depression. PX 297; R. 775, 2872.

- 2012 - Institute for Healthcare Improvement - How-to Guide on Preventing Harm from High-Alert Medications PX 250.

Decades of IV opioid patient safety literature culminated in August of 2012, when the Joint Commission for the Accreditation of Healthcare Organizations ("JCAHO") issued Sentinel Event Alert ("SEA") #49 titled "**SAFE USE OF OPIOIDS IN HOSPITALS**." PX 7, R. 2056. Sentinel Event Alerts are important patient safety alerts that are used to inform healthcare organizations of actual patient safety hazards that have caused serious injury or death to patients. R. 787-788.

SEA #49 cited 30 different medical and patient safety resources on the issue of IV opioid safety. PX 7; R. 789-790. SEA #49 was received by

SMH on August 8, 2012 (almost two-years prior to Mr. West's death). R. 943, 968, 973. The alert stated, "The Joint Commission urges hospitals to take specific steps to prevent serious complication or even deaths from opioid use." PX 7.

SMH's 30(b)(6) corporate representatives and nursing executives each admitted they were aware of the OIRD hazard and patient safety issues associated with IV opioids generally for many years prior to Mr. West's death. R. 902-903, 925, 938, 944-946, 968-969.

Yet, as of June 4, 2014 (22 months after the Joint Commission's SEA #49 was issued and 25 years after the ISMP identified opioids as high-alert medications), SMH had done absolutely nothing to protect its patients from the hazards of IV opioid administration. R. 806, 881, 890, 1032-1041. SMH had not followed a single recommendation or warning from JCAHO, ISMP, the Anesthesia Patient Safety Foundation, or any of the many other safety organizations or publications. *Id*.

All the medical literature and testimony offered by Mrs. West about the well-known dangers of IV opioids and the duties and responsibilities of hospitals to protect their patients from these dangers was uncontroverted at trial by SMH.

As described by Judge Pipes in the post-judgment order, "SMH admitted at the time of Mr. West's death it had been aware of opioid induced respiratory depression for years, including the emphasis on creating a safety program and policies and procedures to address the issue, and that it did not create those programs and policies. SMH's employees testified that the failure to do so was 'not acceptable' and agreed that in retrospect there should have been a policy for continuous pulse oximetry monitoring for high-risk patients receiving IV opioids." C. 4360.

Plaintiff's IV opioid hospital patient safety expert, Dr. Kenneth Rothfield, testified "I really have never seen a hospital without a medication safety program and awareness of the dangers of opioids until I became involved in this matter." R. 806. "Springhill Hospital had done nothing by the way of policies, procedures, education for nurses, technological resources by way of monitoring to keep patients safe. R. 881. "… [t]his is the most egregious overdose I've seen in the most unsafe setting I've ever seen of any case I've ever reviewed." R. 890. Dr. Rothfield's testimony was uncontroverted.

Plaintiff's Chief Nursing Officer expert Kim Arnold, RN, testified that SMH's CNO, Paul Read, breached the standard of care by failing to put even a single policy in place to protect patients from being killed by opioid induced respiratory depression. R. 1032-1036, 1039-1041. Nurse Arnold's testimony that SMH's CNO breached the standard of care was likewise uncontroverted.[9]

Simply put, it is undisputed that SMH knowingly ignored the well-known patient safety hazard of OIRD for over a decade prior to Mr. West's death. As Judge Pipes wrote, "[t]his was not a mere accident. The level of reprehensibility is high." C. 4364.

C. Mr. West's Treatment and Death.

On June 4, 2014, 59-year-old Jay West, then 6' 2" tall and weighing 310 pounds, presented to SMH emergency department after he partially amputated the tip of his left thumb while using a table saw at work. PX 90, 134; R. 1879. Mr. West was a carpenter who owned his own cabinet

[9] During Plaintiff's case she played portions of SMH CNO Paul Read's deposition to the jury. The jury heard Mr. Read admit that he had actual prior knowledge of the dangers of IV opioids, admit his duty to protect patients from the dangers of IV opioids, and admit the failures of SMH to do so. R. 925; 932-935. SMH did not call Mr. Read as a witness during its case to explain any of his admissions or to offer testimony that his conduct was acceptable.

shop. R. 1882. He drove himself to the hospital. R. 1879.

Jay was treated by Mobile's Dr. John McAndrew, a board-certified orthopedic surgeon who admitted Jay to SMH for surgery to repair the wound. PX 94.

At 5:42 p.m. Jay was taken to the operating room for the surgery which lasted only 20 minutes, and where he lost less than 5 ccs (a teaspoon) of blood. PX 156, p. 195.

At 6:16 p.m. Jay was awakened and taken to the recovery room or post-anesthesia care unit (PACU) in satisfactory condition. PX 156, p. 232.

At 7:31 p.m. he was transferred from the PACU to a room on the hospital's orthopedic floor. PX 156, p. 243. Dr. McAndrew wanted Jay to stay the night so that he could receive IV antibiotics to prevent any infection. R. 1652.

Dr. McAndrew wrote two pain medication orders. The first was an order for Percocet, an oral opioid that is much less powerful than IV hydromorphone. R. 1660-1661. The second was for 4 milligrams IV Dilaudid (a/k/a Hydromorphone) every three hours, as needed, for pain management. R. 1654-1655. Dr. McAndrew testified the Dilaudid was

ordered only for "breakthrough or more severe pain that the Percocet wouldn't take care of. *Id*. Dr. McAndrew's medication orders were approved by SMH's pharmacist.[10] Given Jay's size, history of sleep apnea, and the fact that he was post-operative, he was at a high risk of suffering OIRD. R. 823-824, 936-937.

The jury learned about the "analgesic ladder," which is a recognized graphic depiction of the order of administration of the different classes of pain medications for the safe management of a patient's pain. R. 1366-1368, 1499-1501, 1737. One always starts with the least powerful (and least dangerous) pain medication before moving up the ladder to stronger and more dangerous medications. The analgesic ladder clearly required that if Jay experienced pain he should have first been treated with the less powerful and dangerous Percocet before moving to the more powerful and dangerous IV opioid, especially since he was at higher risk of having

[10] SMH insinuates (Brf., p. 58) that Dr. McAndrew (again, a board-certified orthopedic surgeon) was guilty of some wrongdoing in writing these medication orders and for placing Mr. West on the orthopedic floor. However, SMH presented zero evidence at trial from a §6-5-548(c) board certified orthopedic surgeon that Dr. McAndrew did anything wrong. Defense counsel's arguments – like the comments SMH cites from non-qualified witnesses – are not competent evidence of any criticism of Dr. McAndrew.

an adverse respiratory event.

Mobile's Dr. James Spires testified that he interpreted Dr. McAndrew's pain management orders as requiring that the nurse start with oral Percocet, and only if the Percocet didn't work, should she move up the ladder to Dilaudid as needed. R. 1739.

Jane Elenwa, RN, was the SMH nurse responsible for caring for Jay on the orthopedic floor. She was a new nurse recently out of nursing school. R. 1125. SMH admitted it had the responsibility to train Nurse Elenwa on the dangers of IV opioids (R. 933) but hadn't done so. R. 933-935, 956-957, 957-958.

Controlled narcotics, such as opioids, are stored securely at SMH in an electronic medication dispenser known as the Omnicell Machine from which medications can only be retrieved through use of a biometric fingerprint and/or passcode. R. 1096-1097. A detailed report is created upon each retrieval showing the identity of the individual, the time of access and the medications removed. SMH's Omnicell records show that Nurse Elenwa never removed Percocet from the machine, but instead, at 8:19 pm., prior to ever even examining Mr. West, dispensed 4mgs IV Dilaudid. PX 35.

At 10:00 p.m. Nurse Elenwa administered the 4 mg IV Dilaudid to Mr. West. PX 34.

At 11:32 p.m., she removed another 4 mg IV Dilaudid. PX 35.

At 11:51 p.m. she administered the additional 4 mg IV Dilaudid (one hour and 51 minutes after the first administration of 4 mg IV Dilaudid). PX 34.

Mr. West was administered 8 mg of IV Dilaudid (which is seven times as strong as Morphine, so the equivalent of 56 mg of Morphine) in one hour and 51 minutes in direct violation of Dr. McAndrew's medication orders and many times greater than the normal starting dose of .2 mg to 1 mg every two to three hours. R. 1691-1962.

At or near 3:45 a.m. Jay was discovered by SMH's nurse's aide unresponsive and not breathing.[11]

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[11] SMH required Nurse Elenwa to wear an electronic location tracking badge that tracked her location in real time throughout the hospital. PX 49. SMH's Detailed Staff Activity Report shows that Nurse Elenwa never even returned to Mr. West's room at all between 11:49 p.m. and the time she testified she found Mr. West at 3:45 a.m. PX 49, R. 1614. This objective internal hospital report, along with multiple other pieces of evidence in the record, lead Plaintiff's nursing expert Barbara Levin to conclude that "[Jane Elenwa] was not in [Mr. West's] room at 3:00 a.m." even though she falsely documented that she had been. R. 1541-1545.

According to multiple different medical records (CODE log, Phone Records, CODE sheet) an emergency code was not called for Jay until 3:58 a.m. (13 minutes after he was found pulseless and not breathing). R. 1261-1263.

At or near 3:58 a.m. the hospital's code team arrived in Mr. West's room and resuscitative activities started. R. 1261-1262. These efforts were unsuccessful, and Mr. West was pronounced deceased on June 5, 2014, at 4:25 a.m. R. 1279.

SMH maintains a "crash cart" that holds emergency medications that may be needed during emergency code situations. The crash cart utilized around the time of Mr. West's code was stocked with five 0.4 mg amps of Narcan.[12]

SMH's billing invoice for the care it provided to Mr. West states that all 5 units of Narcan were administered to Mr. West for which he was charged $305.50. PX 72.

SMH's physician who responded to the code, Alan Babcock, MD, and the code team's nursing personnel all documented in detail the

[12] Narcan (Naloxone) is the antidote/reversal agent for opioid overdose. It has no other purpose. R. 1386-1387.

medications that they administered during the code. R. 1278. None administered Narcan. PX 17.

Nurse Elenwa had access to the Narcan and ample time to administer the opioid reversal agent during the thirteen-minute interval between finding Jay pulseless and not breathing at 3:45 a.m. and calling the code at 3:58 a.m.

There are no entries in SMH's records showing who administered the five 0.4 mg amps of Narcan or when it was administered despite SMH's certification (R. 1465) its medical record is "accurate."

At 7:27 a.m. on June 5, 2014 (3 hours and 2 mins after Mr. West was pronounced deceased), Nurse Elenwa entered Jay's electronic medical chart and documented a previous physical assessment. PX 46. This "post-death" chart entry of a physical assessment was not only impossible to have been performed (because Mr. West was deceased), R. 1504, but also inaccurate because it was contrary to the assessment she had earlier made of Jay while he was still alive. PX 41; R. 1213.

D. Nurse Elenwa Testifies Falsely Under Oath.

When Nurse Elenwa was deposed, she testified that SMH's medical records are false because she: (1) never acknowledged Dr. McAndrew's IV

Hydromorphone order; (2) never retrieved IV Hydromorphone from the Omnicell; (3) never administered IV Hydromorphone to Mr. West; and (4) never made a post-death physical assessment. R. 1157. She admitted that if she did the things that are reflected in SMH's "accurate" medical records, she would be guilty of gross and egregious violations of the standard of care. R. 1151-1153.

Again, SMH stipulated before the jury that SMH's medical records concerning Jay's care were accurate, so the jury was free to infer that Nurse Elenwa had testified falsely under oath.

STATEMENT OF THE STANDARDS OF REVIEW

1. Judgment as a Matter of Law.

On JML, *Mobile Infirmary Med. Ctr. v. Hodgen,* 884 So. 2d 801, 808 (Ala. 2003) states "we review the evidence in a light most favorable to the non-movant, and we determine whether the party with the burden of proof has produced sufficient evidence to require a jury determination" and "we are required to construe the facts and any reasonable inferences that the jury could have drawn from them most favorably to [the plaintiff]." *See, also, Liberty Life Ins. Co. v. Daugherty,* 840 So. 2d 152, 156 (Ala. 2002) ("A judgment as a matter of law is proper only where

there is a complete absence of proof on a material issue or where there are no controverted questions of fact on which reasonable people could differ and the moving party is entitled to a judgment as a matter of law.").

This Court should "decline to substitute [its] judgment for that of the jury in matters dealing with credibility of witnesses and weight of the evidence." *Williford v. Emerton,* 935 So. 2d 1150, 1154 (Ala. 2004); *Marsh v. Green,* 782 So. 2d 223, 227 (Ala. 2000). "[A]ppellate courts of this state scrupulously avoid assuming a fact-finding role." *Etherton v. City of Homewood*, 700 So. 2d 1374, 1378 (Ala. 1997). Resolving disputed facts is the jury's core function. *Barnes v. Dale*, 530 So. 2d 770, 777-778 (Ala. 1988).

2. New Trial Issues.

On new trial, *Boudreaux v. Pettaway*, 108 So. 3d 486 (Ala. 2012) states "A jury verdict is entitled to a presumption of correctness, and this Court will not reverse the denial of a motion for a new trial unless the evidence, seen in the light most favorable to the non-movant, shows that the jury verdict was plainly and palpably wrong." *Id*., at 487, n. 1, quoting *Zanaty Realty, Inc. v. Williams*, 935 So. 2d 1163, 1166-67 (Ala. 2005). Accordingly,

> "'[A] ruling on a motion for a new trial rests within the sound discretion of the trial judge'" and ... "'[t]he exercise of that discretion carries with it a presumption of correctness, which will not be disturbed by an [an appellate court] unless some legal right is abused and the record plainly and palpably shows the trial judge to be in error.'"

Hosea O. Weaver & Sons, Inc. v. Towner, 663 So. 2d 892, 900 (Ala. 1995).

a. Evidentiary Rulings.

"[S]pecific objections or motions are generally necessary before the ruling of the trial judge is subject to review." *Youngblood v. Martin*, 298 So. 3d 1056, 1060 (Ala. 2020). "[T]he trial court is not in error if inadmissible testimony comes in without objection and without a ruling thereon appearing in the record. The testimony is thus generally admissible and not limited as to weight or purpose." *Tracker Marine Retail, LLC v. Oakley Land Co., LLC,* 190 So. 3d 512, 520 (Ala. Civ. App. 2015) (citing *Ex parte Neal,* 423 So. 2d 850, 852 (Ala. 1982)). "Objections must be raised at the point during trial when the offering of improper evidence is clear." *HealthTrust, Inc. v. Cantrell,* 689 So. 2d 822, 826 (Ala. 1997).

b. Arguments.

"[U]nless there is an objection and it is overruled, 'improper [closing] argument of counsel is not ground for a new trial.'" *Baptist Med.*

Ctr. v. Whitfield, 950 So. 2d 1121, 1127 (Ala. 2006).

c. Harmless Error.

SMH's JML and new trial issues must be considered in light of the harmless error rule:

> No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges **or the improper admission or rejection of evidence,** nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.

Ala. R. App. P. 45 **Error Without Injury** (emphasis added). *See also*, Ala. R. Civ. P. 61 **Harmless Error.** Accordingly, the test is <u>not</u> whether SMH can simply demonstrate some sort of technical error. After all, "[l]itigants are not entitled to a perfect trial, only to a fair one." *Chance v. Dallas County, Ala.*, 456 So. 2d 295, 299 (Ala. 1984). Rather, SMH must prove that "the error complained of" was "plainly and palpably wrong," and "probably injuriously affected [its] substantial rights." As found by the circuit court (C. 4354), the evidentiary rulings were correct and there is no doubt that SMH received a fair trial.

3. Remittitur.

This Court reviews the amount of the verdict *de novo*. *Bednarski v. Johnson*, No. 1200183, 2021 WL 4472478, at *16 (Ala. Sept. 30, 2021).

SUMMARY OF THE ARGUMENT

SMH's arguments for reversal depend upon acceptance of its view of selective bits and pieces of evidence in utter derogation of the requirements of the standard of review.

Nowhere does SMH demonstrate how Judge Pipes' thoughtful and carefully reasoned 22-page order on SMH's post- judgment motions is erroneous, much less so erroneous as to require a new trial in light of the harmless error rule.

Mrs. West answered each and every of SMH's post- judgment JML and New Trial contentions in extensive briefing and argument below, so much so that SMH has now abandoned most of the dozens and dozens of issues it raised initially.

As found by the circuit court, SMH was represented by exceptional counsel at trial, it received a fair trial and there are no challenges to the composition of the jury, the jury's performance, the oral charge on the law and no claims of any improprieties during any of the many pre-trial

and post-trial hearings. Instead, SMH's new appellate counsel complains only of several evidentiary rulings but SMH's arguments depend upon its slanted view of the pertinent evidence which in some instances were not properly raised or preserved for review.

Likewise, SMH's arguments for additional remittitur depend upon acceptance of its mischaracterizations of the evidence and its elevation of some BMW/Hammond/Green Oil factors and disregard of others.

In the end, the verdict as already substantially remitted is fair and just and should be affirmed.

ARGUMENT

I. There Was No Violation Of § 6-5-548.

SMH argues (Brf., pp. 19-24) a new trial is required because the circuit court violated § 6-5-548 when it permitted this country's leading hospital opioid safety expert, Dr. Kenneth Rothfield, MD, "to testify about alleged breaches of the standard of care by Springhill's nurse."[13] Citing inapt federal decisions and decisions from other states, SMH and

[13] In the post-judgment proceedings, SMH complained about Dr. Rothfield being permitted to discuss the duties owed by SMH's nurses and pharmacists, generally. Mrs. West responded fully (C. 2937-2941) and the circuit court rejected this contention. C. 4353.

AHA[14] make no mention of this Court's decisions defining the competency of medical expert witnesses when an institution such as a hospital is the defendant.[15] Dr. Rothfield was qualified at trial as a Chief Medical Officer of an accredited hospital and as an expert in hospital opioid safety (R. 707-719), he was and is eminently qualified to testify about the duties owed by *all* hospital personnel relative to opioid safety and their breaches of those duties, and SMH did not timely and specifically object or move to strike Dr. Rothfield's testimony,[16] so there is no showing of error, much less prejudicial error in permitting Dr. Rothfield to testify.

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[14] The Alabama Hospital Association filed a five page "me too" argument as SMH's amicus (AHA Brf., pp. 12-16) which likewise overlooks controlling decisions and cites inapt decisions.

[15] *E.g., HealthTrust Inc. v. Cantrell*, 689 So. 2d 822, 827 (Ala. 1997) (plaintiff's expert was qualified by education, training and experience to testify when her "testimony demonstrated a knowledgeable familiarity" with hospital's "procedures" and "practices.")

[16] SMH still fails to demonstrate where it properly raised and preserved this issue. Mrs. West alerted the circuit court to the preservation issue (C. 2938-2940) and the circuit court noted SMH's failure to demonstrate it had properly raised and preserved several of its evidentiary issues. C. 4353.

In *Cantrell*, a judgment was affirmed because the hospital did not object to the introduction of evidence before it was introduced, so it had not preserved its alleged error for review. 689 So. 2d at 826. The Court stated "[t]he overruling of objections to questions concerning matters already received into evidence without objection, is not reversible error." *Id*.

In *Rogers v. Adams*, 657 So. 2d 838 (Ala. 1995), this Court noted that:

> The Medical Liability Act does not require that the defendant healthcare provider and the expert witness have identical training, experience, or types of practice, or even the same specialties. To be 'similarly situated' an expert must be able to testify about the standard of care alleged to have been breached in the procedure that is involved in the case.

657 So. 2d at 842. Here, Dr. Rothfield was unquestionably "able to testify about the standard of care alleged to have breached in the procedure that is involved in the case." He is this country's foremost expert on hospital opioid safety and the duties owed by hospitals – including all hospital personnel – relative to opioid safety.

Under analogous circumstances, this Court in *Mobile Infirmary Med. Center v. Hodgen*, 884 So. 2d 801 (Ala. 2003), affirmed a verdict where plaintiff's proof consisted in part of testimony from a physician critical of a hospital's nurse trainee. Dr. Lash, plaintiff's medical expert, testified that a medical professional in an intensive care unit should have known that medications are generally packaged so that one container is the maximum dose for one person. *Id.*, 884 So. 2d at 805. He explained that a qualified nurse should have known something was wrong when, to administer the prescribed dose of Digoxin to a patient, she had to use

three vials of the medicine. *Ibid*. The nurse trainee was inadequately trained because she was put in a position where she was "in over her head," and the hospital failed to put safeguards into place to prevent that nurse's inexperience from hurting patients. *Id*., at 805-06.

The same situation existed here. Mrs. West offered evidence that SMH was liable for the acts and omissions of its nurse, Jane Elenwa, who indisputably was its employee. As in *Hodgen*, a physician expert may testify about how the hospital was negligent with respect to its nurse's inadequate training and the failure of the hospital "to put safeguards into place to prevent [its nurse's] inexperience from hurting patients." *Id*.

SMH is simply incorrect in contending (Brf., pp. 20-21) a physician can never testify "downward" regarding the standard of care owed by a nurse. Numerous opinions in addition to *Rogers* and *Hodgen* hold just the opposite. *See, e.g., Bowden v. Wal-Mart Stores, Inc.*, 2001 WL 617521, Ms. **2-3 (M.D. Ala. 2001) (not reported in Fed. Supp. 2d) (Judge DeMent holds an emergency room physician is qualified as a "similarly situated healthcare provider" given that his education, training and experience were greater than that of a triage nurse working in an emergency room); *Leonard v. Providence Hospital*, 590 So. 2d 906, 907-08 (Ala. 1991) (if a

physician enters orders directing nursing care, he may testify that the hospital's nurses "should follow any orders that he gives for the care of his patients"); *HealthTrust, Inc. v. Cantrell*, *supra*, 689 So. 2d at 827 (operating room *nurse* properly permitted to testify regarding the standard of care owed by operating room *technician*).

To accept SMH's argument would require this Court to overrule *Rogers*, *Hodgen* and the other opinions *and Dowdy v. Lewis*, 612 So. 2d 1149 (Ala. 1992) where expert witnesses who possessed postgraduate degrees in nursing and were engaged in the teaching of nursing qualified to testify because they "made it [their] business to determine what was on the 'cutting edge' of the profession by continual study of the modern trends." *Id*. at 1151. Here, Dr. Rothfield "made it his business" "to be on the cutting edge" "by continual study of" hospital opioid safety. He was "more qualified and current in [his] perception of the existing standard of care than would be required by § 6-5-548(b)." *Id*. at 1151. This Court concluded in *Dowdy v. Lewis*, the trial court did not exceed its discretion in permitting the nursing teachers to testify. So, too, here Judge Pipes did not exceed his discretion in permitting Dr. Rothfield to testify about

the duties owed by SMH's nursing personnel relative to hospital opioid safety.

Even if there *were* error in permitting Dr. Rothfield to testify about Nurse Elenwa, it cannot be deemed reversible error (Ala. R. App. P. 45) because Mrs. West presented expert testimony about the same nursing duties and breaches of the standard of care from witnesses who unquestionably met and exceeded the literal requirements of § 6-5-548(b).[17] Further, Mrs. West elicited *admissions* about Nurse Elenwa's duties and breaches of the standard of care from SMH's Chief Nursing Officer,[18] its Chief Nursing Education Director,[19] SMH's own nursing expert,[20] and from Nurse Elenwa herself.[21] Finally, Mrs. West elicited testimony from yet another of her physician expert witnesses, Dr. Lewis Nelson, MD, about what he would have expected SMH's nurses to do upon receipt of Dr. McAndrew's prescription order and SMH failed to

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[17] *See, e.g.,* testimony of Plaintiff's nursing expert Barbara Levin, RN (R. 1519, 1523) and Plaintiff's Chief Nursing Officer expert Kimberly Arnold, RN (R. 1032, 1036.).

[18] Paul Read, R. 949-950.

[19] Janise Banks, R. 962-963.

[20] Brandy Mobley, R. 2226-2227.

[21] Jane Elenwa, R. 1151-1153.

timely object or move to strike *that* evidence. R. 1467-1468. Accordingly, even if there were error – and there wasn't – it was necessarily *harmless error*.

II. There Was No Violation Of § 6-5-551.

SMH next argues (Brf., pp. 25-27) a new trial is required because Judge Pipes allowed Mrs. West to introduce "evidence of an omission that she did not plead in her complaint," namely "that Nurse Elenwa failed to document the administration of Narcan to Mr. West." Brf., p. 25, citing R. 1465-1466, 1550-1551.[22] This contention is without merit for many reasons.

First, this issue as now framed by SMH on appeal is different from the issue it raised in its post-judgment motion (C. 3835) and brief (C. 2799-2801), and different from what was argued by SMH's counsel in the post-judgment hearing.[23] R. 3209. Simply put, SMH failed to adequately raise or preserve this precise issue. SMH's blue brief again fails to show

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[22] Again, citing inapt decisions and ignoring the trial evidence, AHA's amicus brief (pp. 16-19) fails to demonstrate error, much less error requiring reversal.

[23] Mrs. West responded below to the Narcan issue as it was then framed at C. 2813-2816 and the circuit court rejected this new trial argument. C. 4353.

where this precise issue was timely raised or preserved with a specific objection or adverse ruling and it will be too late to do so for the first time in its reply brief. *Jostens, Inc. v. Herff Jones, LLC*, 308 So. 3d 10, 20, n. 4 (Ala. 2020).

Second, SMH fails to show how evidence of a nurse's failure to document something could be deemed *a proximate cause of Mr. West's death* so as to trigger § 6-5-551's prohibition of evidence of *acts or omissions which "render the health care provider liable to the plaintiff*." An after-the-fact omission cannot logically be a before-the-fact cause of death.

Third, the relevance of Nurse Elenwa's conduct relative to her administration of Narcan to Mr. West[24] first came into focus during the pretrial hearings on the parties' motions in limine when SMH's counsel sought initially to defend SMH by embracing Nurse Elenwa's perjurious testimony about what occurred. Once the circuit court made plain that

[24] Again, Narcan's only purpose or use is as a reversal agent for opioid overdose. R. 1386-1387. Mrs. West and her expert witnesses contended at trial that administering Narcan was the one thing Nurse Elenwa did *right*. Once she figured out she had overdosed Mr. West on Dilaudid, she did what she should have done in administering Narcan to try to reverse the respiratory depressive effect of the Dilaudid.

SMH was bound by its response to plaintiff's request for admissions that its certified medical record was accurate (R. 184, C. 2318) and that SMH would not be permitted before the jury to contend that Nurse Elenwa's denials could at the same time be accurate, it became incumbent upon Mrs. West to prove – through the use of the available circumstantial evidence, including the evidence of Nurse Elenwa's administration of Narcan to Mr. West – that she had in fact overdosed Mr. West with Dilaudid in violation of Dr. McAndrew's orders and the requirements of the standard of care despite Nurse Elenwa's denials of having done so.

This issue was discussed at length relative to Plaintiff's Motion in Limine No. 24 (C. 172) which sought to prevent SMH from suggesting before the jury that its medical record was inaccurate as testified by Jane Elenwa. R. 172-190. There were additional discussions during the February 4, 2022 hearing on all pre-trial motions in limine, including SMH's own motion in limine concerning Narcan. R. 225-234.[25]

The colloquies from the pre-trial hearings made clear that because

[25] SMH filed a motion in limine "pursuant to the Alabama Medical Liability Act and ALA. R. EVID. 403" (C. 1760-1771) which alleged at pp. 6-7, number I, that evidence Nurse Elenwa *administered* Narcan (not that she failed to document it) should be inadmissible because it was not timely pled in conformance with § 6-5-551.

Narcan's sole purpose is as a reversal agent for an opioid overdose, Narcan was available to Nurse Elenwa on the crash cart, Narcan was missing from the crash cart at the time the code was called, and SMH billed Jay's account for Narcan being administered to him, all this evidence constituted *circumstantial evidence* that Jay had in fact been given a Dilaudid overdose by Nurse Elenwa.[26] Judge Pipes was focused laser-sharp on this issue:

> **THE COURT:**
>
> … Well, I don't think -- you know, pleading it, **I don't think that they're alleging it violated the standard of care that Narcan was used or that he overdosed on Narcan. I think it's used in support of the claim that it was Dilaudid and that the nurse realized, oh, my God, I've overdosed this guy.**
>
> **I'm going to deny it as to Number 1.**

R. 234 (emphasis added). This observation led to the formal ruling denying SMH's motion in limine.[27] C. 2319.

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[26] The pre-trial colloquy between counsel and the circuit court (R. 181, 226-234) provides insight about how the Narcan evidence was relevant and admissible.

[27] Once SMH's motion in limine was denied, it was incumbent upon SMH at trial to timely and specifically object if it wished to preserve any issue about the admission of Narcan evidence for later review. Moreover, under Ala. R. Civ. P. 59, SMH was obliged to timely specify in its new trial motion how the circuit court erred in regard to

Mrs. West never elicited any evidence that Nurse Elenwa's failure to document her administration of Narcan caused Mr. West to die, or that her failure to document her administration of Narcan constituted a breach of the standard of care rendering SMH liable. Rather, Mrs. West argued *only* that the evidence constituted circumstantial evidence that Mr. West had been overdosed with the two 4mg. doses of Dilaudid because Narcan is only used to counteract respiratory depression caused by opioids. "There is nothing wrong with a case built around sufficient circumstantial evidence." *Folmar v. Montgomery*, 309 So. 2d 818, 821 (Ala. 1975). "[P]roof of negligence may be established completely through circumstantial evidence." *Cont'l Cas. v. McDonald*, 567 So. 2d 1208, 1211 (Ala. 1990).

As for SMH's suggestion that Mr. West's counsel argued in closing that the jury should find SMH liable for Nurse Elenwa's failure to document her administration of Narcan, SMH failed to object and did not request any curative instruction or mistrial. "[U]nless there is an objection and it is overruled, 'improper [closing] argument of counsel is

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permitting evidence of Nurse Elenwa's failure to document her administration of Narcan, but SMH did not do so. *See* C. 2594-2618.

not ground for new trial.'" *Baptist Med. Ctr. v. Whitfield, supra*, at 1127.

It follows there was no violation of § 6-5-551, there was no error in allowing Mrs. West to discuss the evidence of Narcan generally, there was no error when Nurse Elenwa's failure to document her administration of Narcan to Mr. West was mentioned without objection during closing, and SMH failed to timely raise or preserve this issue.

III. There Was No Improper Exclusion Of Evidence Of Other Hospitals' Contemporaneous Practices.

SMH argues (Brf., pp. 27-35) a new trial is required because the circuit court "abused its discretion in excluding factual evidence that most hospitals in the Country in 2014 were not using continuous pulse oximetry to monitor post-operative patients receiving IV opioids." Again, SMH is wrong.[28]

SMH's argument, below and now, is based upon false premises, namely that the circuit court erred when it prohibited SMH from using

[28] This argument was also thoroughly vetted below. C. 1180-1182, Plaintiff's Motion in Limine No. 21; C. 1184, Plaintiff's Motion in Limine No. 23; R. 147-158, pre-trial hearing; C. 2318, circuit court's Order on Motion in Limine Nos. 21 & 23; C. 3867-3874, Plaintiff's post-judgment Motion to Strike; R. 3143-3196, post-judgment argument; C. 4346-4347, post-judgment Order granting Plaintiff's Motion to Strike. Each of Plaintiff's motions, briefs and arguments are expressly readopted and reasserted here.

an excerpt from the deposition of John Downs (whom SMH indisputably failed to qualify as a "physician" during his deposition such that its exclusion was mandated by the holding of *Prowell v. Children's Hosp. of Alabama*, 949 So. 2d 117, 132-133 (Ala. 2006)); and erred again when it ruled that Nurse Gayle Nash would not be permitted to testify beyond what SMH had specified about her anticipated testimony in its Ala. R. Civ. P. 26(c) disclosures or beyond what Nurse Nash told Plaintiff's counsel she would be testifying about. There was no error in either ruling.

i. John Downs' Deposition.

The circuit court correctly precluded SMH's use of John Downs' deposition excerpt because settled law required it to do so. Specifically, *Prowell v. Children's Hosp. of Alabama*, *supra* (unmentioned by SMH in any of its circuit court briefing or in its blue brief) *required* the circuit court's ruling. There, this Court held the Jefferson Circuit Court properly excluded a deposition in a medical negligence case when the deposition did not establish that the witness was a licensed physician who was qualified as a "similarly situated healthcare provider" as required by § 6-5-548(c). The physician had initially been disclosed as an expert witness by one party but was later withdrawn as a witness before commencement

of the trial. The opposing party attempted to use the deposition, but the party initially identifying the witness objected claiming the deposition transcript failed to reveal facts which properly qualified the physician to testify under the Alabama Medical Liability Act. *Id*., at 130-131.

This Court agreed with the circuit court ruling precluding use of the deposition at trial:

> …in order to be admissible at trial, Dr. Brown's deposition testimony must have established that he qualified as a 'similarly situated healthcare provider,' as required under § 6-5-548(c), Ala. Code 1975. … Because [plaintiff] has pointed us to nothing in Dr. Brown's deposition testimony to indicate that he is a **licensed physician**, that he is Board-Certified in the same specialty as [defendant], or that he has practiced as an Anesthesiologist within the 12-month period preceding Holly's surgery, **we presume his deposition testimony does not address these credentials**.
>
> Additionally, although [plaintiff's] counsel offered a written copy of Dr. Brown's Curriculum Vitae in an attempt to establish his credentials, [plaintiff] could not properly authenticate Dr. Brown's credentials in this manner. **Thus, simply by reading Dr. Brown's deposition testimony, [plaintiff] could not establish before the jury that Dr. Brown was qualified to testify as a 'similarly situated healthcare provider.' For this reason, the deposition testimony, as offered in this action, was inadmissible**. **The trial court properly excluded the reading of Dr. Brown's testimony at trial.**

Id, at 132-133 (emphasis added). So, too, in this case, SMH attempted to use an admission excerpted from Dr. Downs' deposition testimony to

make its erroneous point that a large number of hospitals were not in 2014 post-operatively monitoring patients administered opioids. [29] But nowhere during Dr. Downs' deposition did SMH's counsel (or Plaintiff's counsel) elicit testimony establishing his credentials as a licensed physician qualified to testify under § 6-5-548 or Ala. R. Civ. P. 32(a).

After extensive argument (R. 291-301), the circuit court correctly determined the deposition could not be used and granted Plaintiff's Motion in Limine No. 30 on authority of *Prowell*, *supra*. C. 1961-1963, 2320. SMH does not even mention *Prowell*, much less demonstrate how it is erroneous or distinguishable.

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[29] SMH's new trial argument, like the argument in its blue brief at pp. 31-32, takes Dr. Downs' deposition excerpt out of context, using it to infer something other than what it actually means. This of course violates the standard of review requiring the evidence to be viewed in the light most favorable to the verdict winner, not SMH. Dr. Downs' testimony cited by SMH was referring to hospitals requiring continuous pulse oximetry monitoring for all patients receiving any opioids post-operatively. This would include healthy patients receiving oral opioids such as Percocet. This case involved IV opioids being administered to *high-risk patients post-operatively* as addressed in the Joint Commission's 2012 Sentinel Event Alert. Dr. Downs testified in his deposition (in an excerpt ignored by SMH) that "In my opinion following the sentinel alert in 2012, the hospital should have been placing everybody postoperatively on a pulse oximeter who gets narcotics." C. 2349.

ii. Gayle Nash's Testimony.

Mrs. West's Motion in Limine No. 31 sought to preclude testimony from Nurse Nash that she "went into every hospital across this Country surveying hospitals" and therefore "has knowledge about what the majority of hospitals in this Country were doing relative to continuous pulse oximetry monitoring in 2014." *See* C. 2321-2322, ¶ 1. Mrs. West alerted the circuit court that SMH's "Rule 26 disclosures for Ms. Nash (C. 797-798) made no mention of any such testimony or opinions." *Id*., ¶ 2. Further, when she was deposed Nurse Nash narrowly confined what she intended to discuss, stating "[m]y intention [is] to stay focused on the Joint Commission itself and the Standards and that portion. …" *Ibid*., ¶ 3.

As further explained in Plaintiff's Motion in Limine No. 31, "[to] eliminate any doubt about the scope of Ms. Nash's expected testimony, Plaintiff's counsel examined her further":

> **Q:** Okay. I understand -- at some point I've been produced some documents, including a copy of your CV. And I see that previously you were -- have served as a Chief Nursing Officer; is that correct?
>
> **A:** Yes, that's correct.
>
> **Q:** All right. Well, do you intend in this case to offer

standard of care opinions with regard to what a Chief Nursing Officer should or should not have done in this particular case?

A: No.

Q: Same question that I asked you with regard to the Chief Nursing Officer. Do you intend to offer any standard of care opinions with regard to the acts of the medical-surgical nurse in this case?

A: No.

Q: You are a registered nurse, but you're not going to be offering any Chief Nursing Officer opinions or any medical-surgical nurse opinions in this case; correct?

A: Correct.

Q: **So your testimony is going to be solely limited to the issue of what the Joint Commission requires or doesn't require with regard to Joint Commission Sentinel Event Alerts and Joint Commission Standards?**

A: **Correct.**

C. 2322-2323, ¶ 4 (emphasis added).

The parties argued about this motion at length. R. 284 - 292. Judge Pipes ultimately determined that Nurse Nash would not be permitted to testify outside the limits of what had been disclosed by SMH's trial counsel in the hospital's Rule 26 disclosures:

Plaintiff's motion in limine no. 31 is GRANTED. Defendant's

> expert witness Gayle Nash may not offer any standard of care testimony or opinions, including her observations in various hospitals seen as a surveyor for the Joint Commission about any policies that may or may not have been in place in June, 2014 related to continuous pulse oximetry monitoring for patients receiving opioids. These observations can only [be] relevant toward the standard of care, and for no other reason that the Court has been shown.

C. 2428.

A motion in limine is a proper vehicle for preventing a jury from hearing prejudicial evidence. *Ex parte Houston County*, 435 So. 2d 1268, 1271 (Ala. 1983); *Acklin v. Bramm*, 374 So. 2d 1348 (Ala. 1979); *Louisville & Nashville Railroad Co. v. Phillips*, 293 Ala. 713, 310 So. 2d 194 (1975). Mrs. West was entitled to rely upon the veracity of SMH's Rule 26 disclosures and on the veracity of Ms. Nash's answers to questions during her deposition. Rule 26 requires disclosure of "the subject matter on which the expert is expected to testify, and to state the substance of the **facts** and **opinions** to which the expert is expected to testify and a summary of the grounds for each opinion." Ala. R. Civ. P. 26(b)(5)(A)(i). *See, Edwards v. Valentine*, 926 So. 2d 315, 327 (Ala. 2005).

The circuit court properly exercised its discretion in preventing the jury from hearing prejudicial evidence which was not timely disclosed in conformance with its pre-trial order concerning Rule 26 disclosures and

deadlines, and properly exercised its discretion in preventing the jury from hearing prejudicial evidence which far exceeded the scope of what Ms. Nash told Mrs. West's counsel she would be testifying about at trial. It matters not that SMH now contends the withheld evidence could have been *relevant* to its defense. The point is that SMH's own failure to comply with the pre-trial order, Rule 26(c) and the duty of its witness to tell the truth, the whole truth, and nothing but the truth when testifying under oath during a deposition led to the circuit court's eminently correct exercise of its discretion in precluding use of such testimony.

In addition to the foregoing, Judge Pipes expressly instructed the parties that rulings on the motions in limine were *preliminary* such that specific objections would have to be raised at trial:

> Keep in mind, these are just pre-trial motions. We're all guessing at what may or may not be said, that kind of thing. This completely leaves the door open for objections at trial if either party feels like we're going into issues that either a witness is not qualified to give an opinion on, relevancy, all the kind of stuff.

R. 100. It was therefore incumbent upon SMH to timely object and preserve the issue at trial with an offer of proof. Its blue brief fails to show where it did so, and it is too late to do so in a reply brief. *Jostens, Inc., supra.*

SMH's argument also disregards the circuit court's ruling which granted Plaintiff's motion to strike references to improperly cited "evidence" in SMH's post-judgment briefs (C. 3867-3874) and the corresponding arguments in the post-judgment hearing. R. 3143-3156. Judge Pipes again struck these already stricken improper excerpts. C. 4348-4369. SMH's blue brief ignores this ruling and relies nevertheless on the same stricken excerpts as grounds for reversal.

Furthermore, the circuit court permitted SMH during the post-judgment discovery period to depose Nurse Nash and to present that testimony in support of its contentions regarding its alleged want-of-reprehensibility. As argued by Plaintiff's counsel during the post-judgment hearing (R. 3321-3328), Nurse Nash's post-judgment testimony does not support the assertion that "most hospitals" "were not using continuous-pulse-oximetry monitoring in June 2014." On the contrary, Nurse Nash admitted that she was at best familiar with the practices at just 0.2% of hospitals in the country (construing her testimony *generously*) so she *conceded* she was in no position to assert factually or as a matter of opinion what "most hospitals" were or were not doing in 2014 relative to opioid monitoring. R. 3323.

In short, no evidence supports SMH's assertions about what "most hospitals" were or were not doing in 2014, SMH altogether fails to demonstrate how Judge Pipes erred in precluding SMH from using that so-called "evidence" at trial, and SMH again fails to show how these issues were timely raised or preserved.

IV. There Is No Good Count/Bad Count Issue.

Citing *Long v. Wade*, 980 So. 2d 378, 385-387 (Ala. 2000) (Brf., pp. 35-36), SMH argues a new trial must be granted because Mrs. West failed to present substantial evidence supporting her "negligent failure to train" and "negligent failure to question a medication dose" claims. According to SMH, "[i]f a jury returns a general verdict, a plaintiff's failure of proof on one basis for a negligence claim requires a new trial under the good count/bad count rule." SMH is wrong.

In this case, unlike *Long v. Wade*, no bad "count" was ever submitted to the jury for its consideration. Instead, the jury was charged only, and without objection by SMH, about one single count of negligence, not Mrs. West's alternative theories of negligence.[30] "[J]uries are

[30] See R. 2335-2562, R. 2762-2764 (charge conference) and R. 3046-3067 (oral charge).

authorized to return verdicts only as to claims on which they have been instructed." *Regions Bank v. Plott*, 897 So. 2d 239, 246 (Ala. 2004) (emphasis in original).[31] Thus, it is the instructions contained within the circuit court's oral charge to the jury, not what may have been alleged in the pleadings, nor what conduct or theories may have been fleshed out at trial, that ultimately determines what claims, defenses and issues are submitted to the jury and decided by the jury.[32]

Here, the jury was instructed it could return a verdict based upon SMH's own negligence and upon SMH's vicarious liability for the deviations from the standard of care of its Chief Nursing Officer Paul Read, RN and the acts/omissions of Nurse Elenwa.[33] R. 3055-3059. The

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[31] *See, also, Beiersdoerfer v. Hilb, Rogal and Hamilton Co.*, 953 So. 2d 1196, 1209-1210 (Ala. 2006) (unobjected-to instructions become the law of the case and the jury is bound to follow such instructions even if they are erroneous so that a judgment entered on the jury's verdict comporting with those instructions would not be reversed on appeal.); *412 South Court Street, LLC v. Alabama Psychiatric Servs., P.C.*, 163 So. 3d 1020, 1029 (Ala. Civ. App. 2014).

[32] *See, e.g., Proctor & Gamble Co. v. Staples*, 551 So. 2d 949, 950, 954-955 (Ala. 1989); *National Sec. Fire and Cas. Co., Inc. v. Vintson*, 414 So. 2d 49, 52 (Ala. 1982); *City's Service Oil Co. v. Griffin*, 357 So. 2d 333, 344-345 (Ala. 1978); *Barfield v. Wright*, 286 Ala. 402, 406, 240 So. 2d 593, 596 (1970).

[33] This part of the court's oral charge was taken directly from APJI 3d, Nos. 25.02 and 25.03 (*See* R. 2545-2548 (charge conference)).

jury was expressly instructed it could not return a verdict based upon acts/omissions of SMH's pharmacist. *Id.*[34] At no point was the jury instructed about any individual or discreet alternative theories of negligence Mrs. West was advancing against SMH, CNO Read or Nurse Elenwa. *Ibid*. At no point did SMH object to the charge. Instead, it stated it had no exceptions. R. 3067. No "counts" concerning negligent training or negligent failure to question a medication dose were ever mentioned in the oral charge.

By contrast, in *Long v. Wade*, the jury instructions expressly contained "counts" relative to plaintiff's alternative theories of medical

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[34] SMH acknowledges (Brf., p. 24 ¶ 4), the court instructed the jury (R. 3057-3058) that Plaintiff was not claiming that Springhill's pharmacist breached the standard of care but argues "that fleeting instruction (coming nearly two weeks after Dr. Rothfield testified) could not ameliorate the prejudice of Dr. Rothfield's inadmissible pharmacist-standard-of-care testimony." However, SMH waived appellate review of this issue when it did not object and when it stated it had no exceptions to the oral charge. R. 3067. *See, e.g., Kult v. Kelly*, 987 So. 2d 551, 557 (Ala. 2007) (when parties express their approval of jury instructions by declining to object, any claim based on an allegedly defective or inadequate instruction is waived, and a general verdict returned by the jury can be analyzed only regarding claims on which it was instructed.); *Jackson v. State*, 593 So. 2d 167, 173 (Ala. Crim. App. 1991)("defense counsel announced 'satisfied' with the instructions of the trial judge, he cannot now be heard to complain that those instructions to disregard [inadmissible evidence] were not sufficient to erase the testimony from the minds of the jury.")

negligence. There, the circuit court instructed the jury it might impose liability based upon that list of identified alternative theories of negligence. The defendants objected to these instructions, and their objections were overruled. *Id.*, 980 So. 2d at 382. Defendants contended they were entitled to a new trial under the good count/bad count rule "because the trial court instructed the jury that [plaintiffs'] claims" included ones based on certain identified acts and omissions that were not supported by sufficient evidence. *Id.*, 980 So. 2d at 385. This Court highlighted the peculiar nature of that charge by quoting from the instructions and italicizing the language setting forth the unsubstantiated negligent acts. *Id*. The Court's analysis emphasizes that although it was undisputed there was insufficient evidence relative to the defendants' failure to obtain a cord-blood sample or to perform a vaginal delivery, "the trial court had charged the jury" that the plaintiffs were seeking to recover for both those specific acts. *Ibid*.

In this case, Judge Pipes gave only a charge modeled upon the pattern jury instructions which instructed the jury it could return a verdict if it found SMH had itself deviated below the requirements of the standard of care and that SMH could be held vicariously liable if its CNO

or Nurse Elenwa had deviated below the requirements of the standard of care. The circuit court never defined the discreet alternative theories of liability concerning SMH, CNO Read, or Nurse Elenwa. In other words, the circuit court submitted only a single, undifferentiated count of medical negligence, so no "bad count" was ever specified in the instruction. Once the oral charge was given, SMH stated expressly it had no exceptions to that charge. R. 3067. That charge therefore became the law of the case, and that is the end of the matter.

To accept SMH's contention would require this Court to distinguish *Long v. Wade* and overrule an opinion just one year old, *Bednarski v. Johnson*, No. 1200183, 2021 WL 4472478, ___ So. 3d ___ (Ala. Sept. 30, 2021), where this Court rejected a similar good count/bad count argument predicated upon a health care defendant's challenge to a negligent training claim. In *Bednarski*, the Court expressly noted the defendants in *Long v. Wade* had objected to the jury instructions. *Id.* at *14. In *Bednarski*, as here, there was and is a failure to demonstrate the alleged error was properly raised or preserved for appellate review. *Id.*

V. Mrs. West Presented Substantial Evidence Supporting Her Negligent Training Theory.

SMH argues (Brf., pp. 36-41) the circuit court erred in not granting JML on Mrs. West's negligent training theory because "Plaintiff failed to present substantial evidence that Springhill knew or should have known of Nurse Elenwa's alleged incompetence." *Id.*, p. 38. When SMH raised this argument in its post-judgment briefing, Mrs. West responded (C. 2917-2925) with a catalogue of evidence from SMH's own employees including its CNO, Paul Read and its Director of Clinical Education (and 30(b)(6) representative) Janise Banks, RN from which the jury could conclude or infer Springhill was aware of Nurse Elenwa's incompetence. C. 2919-2923. Mrs. West also quoted Nurse Elenwa's own admission that she had received no training from SMH with regard to patients who receive IV opioids being continuously monitored for oxygen saturations. C. 2923. Nowhere does SMH's blue brief counter this evidence, refute it within the limitations imposed by the standard of review or show how the circuit court erred in concluding this evidence and the permissible inferences constituted substantial evidence precluding JML.

In denying SMH's Renewed Motion for JML, the circuit court reasoned:

> Those cases cited by SMH make no distinction between negligent training and negligent retention. See *Pritchett v. ICN Med. Alliance, Inc.*, 938 So. 2d 933, 940-41 (Ala. 2006), *Southland Bank v. A&A Drywall Supply Co.*, 21 So. 3d 1196, 1215 (Ala. 2008). A claim for negligent *retention* would necessarily require notice; the theory is that the principal negligently kept an employee despite notice of his incompetence or reckless nature. However, negligent *training*, including the failure to train at all, does not. Instead, it focuses on the principal's actions, or lack thereof, and the principal's duty to adequately prepare its employee to safely perform the task she was hired for. Because the hospital controls the training, it is on notice of what it has and has not done.

C. 4351. SMH challenges this conclusion arguing (Brf., p. 38) "the failure to offer specific training alone does not establish a negligent-training claim. See *Craft v. Triumph Logistics, Inc.*, 107 F.Supp.3d 1218, 1224 (M.D. Ala. 2015) (rejecting argument that a defendant's "failure to train [employee] properly means that he necessarily was incompetent")." However, in granting summary judgment on the negligent training claim, the court in *Craft* cited evidence that the commercial truck driver's training included "defensive driving" provided by a former employer. In its effort to analogize this case to *Craft*, SMH argues (Brf. p. 38, n. 9) "[t]he training that Nurse Elenwa received in nursing school and at Springhill, R. 1063, 1124-25, 1129-32, 1199-1200, precludes any argument that her incompetence can be presumed. *See Craft*, 107

F.Supp.3d at 1224."

This argument again utterly disregards the requirements of the standard of review, namely that all evidence and all permissible inferences be viewed in the light most favorable to Mrs. West and that its motion for JML be denied unless there is a "complete absence of proof." The admissions from SMH's officers, corporate representatives, and Jane Elenwa herself, which are ignored by SMH, are fatal to its challenge to the sufficiency of the evidence on negligent training: Chief Nursing Officer Paul Read agreed when asked if Jane Elenwa *should have been specifically educated on the potential effect of IV opioid therapy causing respiratory depression*. R. 993. He also agreed that Jane Elenwa *should have been trained on how to effectively protect patients receiving IV opioid therapy from suffering respiratory depression* and that she *should have been educated on the nature of obstructive sleep apnea and the risk it poses to SMH's patients*. R. 935. Nurse Banks testified *there was no specific training provided to Nurse Elenwa* with regard to enhanced dangers of IV opioid therapy when being administered to patients with obstructive sleep apnea, that *Nurse Elenwa was given no training* with respect to the characteristics of patients who should be suspected of having obstructive

sleep apnea, and *she was given no training* with regard to the characteristics of patients that are at high risk of suffering adverse events while being administered IV opioids. R. 957-958.

Nurse Elenwa herself admitted there was "*no training*." R. 1202.

Additionally, Plaintiff's Chief Nursing Officer expert Kim Arnold testified that in June of 2014 (and before) the standard of care *required hospital CNOs to educate hospital nursing staff about protecting patients from the adverse effects of IV opioids*. R. 1019. Nurse Arnold testified that SMH *should have trained Nurse Elenwa* on how to effectively protect patients receiving IV opioid therapy from suffering respiratory depression *but failed to do so*. R. 1024.

Moreover, the jury was instructed in accordance with APJI 3d No. 15.14 it could disregard all testimony from any witness whom it determined willfully testified falsely. R. 3050-3051. Not only did defense counsel agree that a willful false testimony charge was warranted (see R. 2544), Mr. Lee stated during the charge conference "I don't think there is any secret about what we're talking about here,"[35] R. 2542, an obvious

[35] Judge Pipes agreed "[i]t's pretty obvious who we're talking about." R. 2542.

reference to the hospital's acknowledgement that Nurse Elenwa willfully testified falsely to a number of material issues.[36] SMH's effort to argue "no harm no foul" because Nurse Elenwa received training on opioids before beginning employment at SMH rests on the testimony of its witness whose testimony the jury was free to disregard in its entirety. This is yet another basis to reject SMH's contentions.

Finally, and in any event, the jury was not directed in the oral charge to decide a "negligent training" claim, and SMH did not object to the charge as given, so no insufficiency of evidence of a "negligent training" claim issue was timely raised or preserved.

VI. The Learned Intermediary Doctrine Has No Application To The Facts Of This Case.

SMH mischaracterizes Mrs. West's claim relative to Nurse Elenwa's overdosing her husband with Dilaudid (Brf., pp. 41-45) and then attempts to demonstrate reversible error through citing an inapt opinion concerning the learned-intermediary doctrine and its impact upon the duties owed by a hospital's pharmacist. But mischaracterizing

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[36] SMH admits on appeal Nurse Elenwa testified falsely "[w]hile Nurse Elenwa plainly should have told the truth, the trial court should not have attributed any responsibility to Springhill for her **false testimony**…." Brf., p. 55 (emphasis added).

the nature of Plaintiff's claims does not change the evidence of record that Nurse Elenwa repeatedly and grossly violated Dr. McAndrew's prescription orders when she a) failed first to give Mr. West a Percocet tablet, as specified, b) started instead with a 4 mg bolus IV dose of Dilaudid (which, again, has an efficacy of *7 times the effect of Morphine*) rather than starting with a smaller and less dangerous dose (as ordered by Dr. McAndrew to see whether the smaller dose would alleviate Mr. West's pain) which was also required by the standard of care (as explained in medical literature that a starting dose of Dilaudid for a patient like Mr. West should be .2 up to 1 mg) c) she again violated Dr. McAndrew's order when she gave another 4 mg bolus IV dose of Dilaudid less than 2 hours later, contrary to the order's explicit instruction about the timing of such doses, and d) when deposed, *then lied about giving any Dilaudid to Mr. West at all*, contending repeatedly SMH's medical records were erroneous and that she had only given Jay one pill on one occasion.

This issue was thoroughly vetted below (C. 2925-2928) and rejected by the circuit court as a basis for JML. C. 4352.

A nurse has the imperative duty to protect and advocate for her patients, and this includes questioning a physician's medication orders

when it is unclear or seems inappropriate. Every physician and nursing witness who testified at trial agreed with this principle. Further, the Alabama Nurse Practice Act imposes the affirmative duty upon nurses to understand the medications they are administering to patients and the appropriate dosage ranges for the particular drug. The Nurse Practice Act *requires* that a nurse contact a physician when she has questions about the medications prescribed, and nurses run the risk of punishment if they fail to follow this affirmative duty. R. 1491-1492. Plaintiff's nursing expert, Barbara Levin, RN characterized this duty as "fundamental nursing 101." R. 1485-1488. There was substantial testimony and demonstrative exhibits presented to the jury on the 7 rights of medication administration for nurses: Right Patient, Right Drug, Right Time, Right Route, Right Dose, Right Reason, Right Documentation. R. 1488. It is fundamental to nursing that a nurse understand the medications she is administering a patient. R. 1490-1491.[37]

[37] It is curious indeed that the Nursing Association's amicus brief advocates for such a no-nursing-duty rule in the face of all the uncontroverted trial evidence elicited about the requirements of the Alabama Nurse Practice Act, Chapter 610-X-6 (R. 1486-1490; 1519; 2235) , voluminous peer-reviewed nursing literature recognizing such

When asked about SMH's counsel's suggestion to the jury that nurses just blindly follow physician's medication orders, Nurse Levin responded, "that is not accurate at all. It's our responsibility to know our patients, to do a full assessment of our patients, to review the orders, to know the reason that the patients are to be administered the medications." R. 1487. The standard of care *required* Nurse Elenwa to contact Dr. McAndrew and clarify his intent if she had any question about what he meant by his Dilaudid order for a high-risk, opioid-naïve patient like Mr. West. R. 1519.

SMH's own nursing expert witness Brandy Mobley *agreed* that "nurses don't blindly follow the orders of anyone," and "when it comes to administrating medications, a nurse has a responsibility independent of what the order may be to make sure that it's the …right dose." R. 2233-

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duties, expert opinion testimony from both Plaintiff's and SMH's expert witnesses uniformly recognizing such duties (R. 1486-1490; 1519; 2235) and admissions from SMH's own CNO (R. 942) and Director of Nurse Education (R. 963) which likewise recognize that SMH's nurses owe such duties to their patients. The Alabama Nursing Association seems to be advocating that Alabama nurses should be allowed to administer gross overdoses and/or inappropriate drugs to patients with impunity so long as a physician has written the medication order no matter how confusing or inaccurate or inappropriate the order is. Alabama patients and their families deserve better than this.

2234. She conceded that this responsibility is even more important when it comes to administering IV opioids because of the known fatal risk associated with the drugs. R. 2234. Nurse Mobley also *agreed* that a nurse *must* contact the prescriber if there are concerns about the medication or question about the dosage. R. 2238.

SMH's Nurse, Joann Edwards, RN likewise *agreed* that she would call a physician to verify medication orders if she saw an IV opioid medication order in an excessive amount. R. 2082.

Even Nurse Elenwa *agreed* that 4 mg IV Dilaudid was an excessive amount and that if she saw such a medication order she would have the responsibility to question the order. She specifically testified that she would "call the doctor" and "verify the orders." R. 1142.

Finally, Mrs. West presented excerpts from nursing literature to the effect that a nurse should question IV Dilaudid orders for an opioid naïve patient like Mr. West where the starting dose is greater than 0.4 to 0.5 mg. PX 280. Nurse Levin testified that she agreed with this literature and that it is information that a nurse on a medical surgical floor in June of 2014 should have known. R. 1518.

In short, **all** the evidence presented at trial confirmed that a

registered nurse working on a medical surgical floor in June of 2014 had a duty to understand the medications she was administering to patients and to question any physician's orders when a medication order was confusing or seemed inappropriate.

SMH's and the Nursing Association's reliance upon *Springhill Hospital's, Inc. v. Larrimore*, 5 So. 3d 513 (Ala. 2008) is misplaced. Mrs. West at no time in any pre-trial proceedings, during the presentation of evidence or in her opening statements or closing arguments ever advocated that Nurse Elenwa should alter or deviate from Dr. McAndrew's orders. Rather, Mrs. West advocated at all times that all nurses, including Nurse Elenwa, have the imperative duty to understand the medications they are administering for the safety of their patients.

Moreover, *Larrimore* is distinguishable because there the plaintiff elected not to present evidence of any statutory or regulatory duties owed by pharmacists. *See id.*, 5 So. 3d at 519, n. 9. Here, in stark contrast, Mrs. West introduced numerous excerpts from the Alabama Nurse Practice Act, and nursing medical literature and expert testimony (from both sides) recognizing and confirming the existence of this duty, and SMH offered *nothing* to refute any of this.

Finally, as with SMH's JML contention about Plaintiff's "negligent training" theory, SMH never objected to the jury charge, and never sought any special interrogatory about this alternate theory of negligence, so no JML issue was properly raised or preserved.

VII. Section 6-5-547 Should Not Be Resurrected.

SMH devotes four pages to argue (Brf., pp. 45-49) that former § 6-5-547 should be revived and the holding of *Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995) overruled.[38] SMH's/ACJRC's arguments spring from the erroneous suppositions that "*Schulte* was based on two now-invalidated grounds: an infringement on the Alabama Constitution's right to trial by jury and its supposed equal-protection guarantee." (Blue Brf., p. 46; ACJRC Brf., p. 7). These assertions depend, in turn, upon the equally erroneous suppositions that *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999) and *Ex parte Apicella*, 809 So. 2d 865 (Ala. 2001), both mere *plurality* opinions, undermined *Smith v. Schulte* and its progeny.[39] But the

[38] SMH apparently delegated the crux of its § 6-5-547 argument to ACJRC which filed a "me too" amicus brief consisting of 3,283 words (17 pages) also advancing this argument.

[39] "The precedential value of the reasoning in a plurality opinion is questionable at best." *Ex parte Discount Foods, Inc.*, 789 So. 2d 842, 845 (Ala. 2001); *Ex parte Achenbach*, 783 So. 2d 4, 7 (Ala. 2000). Plurality opinions that do not command a majority of the Court do not

separate writings in *Melof* and *Apicella* did not change the *holding* of *Smith v. Schulte* that § 6-5-547 is unconstitutional, nor did *Melof* or *Apicella* prevent this Court from refusing other similar requests to overrule *Smith v. Schulte* in *Mobile Infirmary Med. Ctr. v. Hodgen*, 884 So. 2d 801 (Ala. 2003), *Mobile Infirmary v. Tyler*, 981 So. 2d 1077 (Ala. 2007), *Gillis v. Frazier*, 214 So. 3d 1127 (Ala. 2014), and other appeals.[40]

While this Court has stated that the question of whether §§ 1, 6 and 22 of Article I of our Constitution combine to guarantee the citizens of Alabama equal protection under the law "remains in dispute," *Tolbert v.*

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constitute holdings of the Court. *Ryan v. Hayes*, 831 So. 2d 21 (Ala. 2002); *Harvey v. City of Oneonta*, 715 So. 2d 779, 780 (Ala. 1998).

[40] The Court was presented with full briefing concerning the § 6-5-547 issue in *Montclair Orthopedic Surgeons v. Smith*, Case Nos. 1020407, 1020408, and that appeal resulted in a no opinion affirmance of the judgment on August 29, 2003. The issue was again presented in *Tongco v. Reynolds*, Case Nos. 1040479, 1040492, 1040480 and 1040491, but that appeal was affirmed "no opinion" on December 14, 2007.

As pointed out to the circuit court in the post-judgment proceedings, SMH also tried this same gambit ten years ago in still another medical negligence wrongful death case before Mobile Circuit Judge Rick Stout in *David L. Oden, as Administrator of the Estate of Teresa Oden, deceased v. Springhill Hospital, Inc., d/b/a Springhill Memorial Hospital*, Mobile County Circuit Court Civil Action No.: CV-2010-900421-RPS. Below-signed counsel pointed out the same legal deficiencies back then, and SMH has done nothing in the interim.

Tolbert, 903 So. 2d 103, 109 (Ala. 2004), the *holdings* of this Court's prior precedents are clear to the effect that our citizens continue to enjoy a State equal protection guarantee.[41]

This Court was presented with full briefing and an opportunity to address whether Alabama's Constitution affords equal protection in *Mobile Infirmary v. Hodgen*, *supra*[42] but following its prudential rule, the

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[41] *See, e.g.*, *See, e.g.*, *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 165 (Ala. 1991) ("Sections 1, 6, and 22 of the Declaration of Rights combine to guarantee equal protection under the laws of Alabama."); *Plitt v. Griggs*, 585 So. 2d 1317, 1325 (Ala. 1991) ("Sections 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the laws."); *Black v. Pike County Comm'n*, 360 So. 2d 303, 306 (Ala.1978) (same); *Peddy v. Montgomery*, 345 So. 2d 631, 633 (Ala. 1977) ("Any doubt about whether the Constitution of Alabama contained an equal protection provision was dispelled in *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939), where it was held that §§ 1, 6 and 22 of Article I of the Constitution of 1901, taken together, guaranteed the equal protection of the laws, and prohibit one from being deprived of his inalienable rights without due process."). *See also*, *Dyas v. City of Fairhope*, 2010 WL 5477754 (S.D. Ala. 2010) not reported in F. Supp. 2d (explaining that *Ex parte Melof* was a plurality opinion such that it "does not in fact hold that there is absolutely no actionable equal protection component to the Alabama Constitution" [because] "[prior] to *Melof*, several Supreme Court decisions ruled that there is such an equal protection guarantee and since *Melof* is not a holding, those cases would appear to remain the law of Alabama.").

[42] *See, e.g.,* Brief of *Amicus Curiae* the Alabama Trial Lawyers Association, 2002 WL 34254265 (Nov. 15, 2002) at pp. 44-84.

Court decided the appeal without addressing the constitutional question.

It is settled that this Court will not decide constitutional issues when an appeal can be decided on other grounds. The Court has followed this prudential principle for over 100 years:

> Whenever the question is distinctly presented necessary to the decision of the particular case, this court will not hesitate to determine the constitutionality of legislative enactments. But it is the settled doctrine of this court that "upon such questions courts do not enter when the case before them can be determined on other grounds." *Joiner v. Winston*, 68 Ala. 129 [(1880)]; *Smith v. Speed*, 50 Ala. 276 [(1874)].

Hill v. Tarver, 130 Ala. 592, 30 So. 499, 499 (1901). Likewise,

> Generally courts are reluctant to reach constitutional questions, and should not do so, if the merits of the case can be settled on non-constitutional grounds. *White v. U.S. Pipe & Foundry Co.*, 646 F. 2d 203 (5th Cir. 1981). Courts will inquire into the constitutionality of a statute only when and to the extent that the case before the court requires. [*Charles C. Steward Machine Co. v. Davis*, 89 F.2d 207 (5th Cir.), *aff'd*, 301 U.S. 548 (1937)]. A court has a duty to avoid constitutional questions unless essential to the proper disposition of the case. *Doughty v. Tarwater*, 261 Ala. 263, 73 So. 2d 540 (1954); *Moses v. Tarwater*, 257 Ala. 361, 58 So. 2d 757 (1952); *Lee v. Macon Co. Board of Education*, 231 F. Supp. 743 (M.D.Ala.1964).
>
> No matter how much the parties may desire adjudication of important questions of constitutional law, broad considerations of the appropriate exercise of judicial power prevents such determinations unless actually compelled by the litigation before the court. *Troy State University v. Dickey*, 402 F. 2d 515 (5th Cir. 1968).

Lowe v. Fulford, 442 So. 2d 29, 33 (Ala. 1983)(quoting and agreeing with the trial court's order under review). See also *Kirby v. City of Anniston*, 720 So. 2d 887, 889 (Ala. 1998) ("a court has a duty to avoid a constitutional question unless an answer to it is essential to the proper disposition of the case.").

This Court should again exercise prudence and decide this case without reaching the constitutional issue for several reasons. First, to do so, the Court would have to overrule *Hodgen* and *Mobile Infirmary v. Tyler*, 981 So. 2d at 1104-1105, n. 27 where the Court rejected an identical attempt to resurrect § 6-5-547 holding "*Hodgen* noted that '[s]ection 6-11-21, as so amended, has been recognized as a complete replacement of the old statutory restrictions on punitive damages.'" And, this Court would also have to overrule *Gillis v. Frazier*, 214 So. 3d at 1134 where the Court reaffirmed its decision in *Tyler* holding "[a]fter considering *Schulte* and its progeny and the cases cited by [the defendant], we are not persuaded to overrule *Schulte*." Neither SMH nor the ACJRC have asked this Court to overrule *Hodgen*, *Tyler* or *Gillis*.

Furthermore, SMH has not demonstrated that it adequately raised or preserved this issue in the first instance. Its Answer to Plaintiff's

Second Amended Complaint does not raise the former damages cap issue with the specificity now raised for the first time by SMH's new appellate counsel. Moreover, this new attempt at resurrecting § 6-5-547 came long after the 30-day deadline of Ala. R. Civ. P. 59 for raising new trial issues had passed. SMH's trial counsel never filed any pre-trial motions of any sort seeking imposition of the *former* damages cap. There were no adverse rulings from the circuit court rejecting any effort to impose such damages cap. And, there was no timely compliance with § 6-6-227 in notifying the Attorney General of SMH's constitutional challenge affecting § 6-5-547.

A party cannot invoke action by a court and have a case tried on certain issues and then later, when dissatisfied with the result, raise an entirely new issue such as the constitutionality of the statues under which the case was proceeding on motion for a new trial. *Alabama Power Co. v. Turner*, 575 So. 2d 551, 552-553 (Ala. 1991). *See, also Ala. Power v. Courtney*, 539 So. 2d 170, 171-173 (Ala. 1988) (a party cannot wait to challenge application of Alabama's wrongful death punitive damages remedy until a verdict is returned).

The Alabama Legislature has had *annual opportunities* since *Smith v. Schulte*, *Ray v. Anesthesia Associates*, 674 So. 2d 525 (1995), *Mobile*

Infirmary v. Hodgen, *Mobile Infirmary v. Tyler*, *Gillis v. Frazier* and the other cases were decided to resurrect § 6-5-547 or to cure its alleged constitutional infirmities but it has elected each year *not to do so*. The legislature's last word was in 1999 when it fully considered the issue of punitive damages and promulgated Act No. 99-358, now codified as an amended version of § 6-11-21, Ala. Code 1975. Amended § 6-11-21(a) provides: "Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed" the specified amounts. § 6-11-21(a)(emphasis added). Subsection (j) provides: "This section shall not apply to actions for wrongful death or for intentional infliction of physical injury." Because amended § 6-11-21(a) applies to "all civil actions," it has the effect of superseding *Moore v. Mobile Infirmary*, 592 So. 2d 156 (Ala. 1992), to the extent that *Moore* held unconstitutional the limitation that § 6-5-544 imposed on punitive damages in personal injury medical liability actions. By expressly declining to enact any new or revived limitation on punitive damages *in wrongful death actions*, the 1999 Legislature – and every legislature since then – has refrained from any attempt to adopt a new limitation on

medical liability act wrongful death actions. Before 1999, the operative provisions of § 6-5-544, § 6-5-547, and former § 6-11-21 were unconstitutional and inoperative. After 1999, new § 6-11-21 imposed new punitive damages caps in non-wrongful-death actions. Thus, the legislature breathed new life into caps on the kinds of claims that had been affected by former §§ 6-11-21 and 6-5-544. The fact that the legislature has not imposed new caps on actions within the scope of old § 6-5-547 is an additional reason to deny Springhill's/ACJRC's requests for such relief. Even if the Court were not bound by *Smith v. Schulte* and *Ray v. Anesthesia Associates*, there would be no reason to breathe new life into a legislative act that was declared unconstitutional so many years ago, especially in light of the legislative activity in this field that adopted amended versions of some of the voided 1987 statutes, but not § 6-5-547.

Again, in *Mobile Infirmary Med. Center v. Hodgen*, *supra*, this Court observed:

> The Legislature, when it enacts legislation, is presumed to have knowledge of existing law and of the judicial construction of existing statutes. See *Ex parte Fontaine Trailer Co.*, 854 So. 2d 71 (Ala. 2003). Thus, with the knowledge that § 6-5-544(b), Ala. Code 1975, had been declared unconstitutional in 1991 and that § 6-11-21, Ala.

> Code 1975, which provided a general cap on punitive-damages awards, had been declared unconstitutional in 1993, see *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), the Legislature in 1999 rewrote § 6-11-21, Ala. Code 1975, to provide caps on punitive-damages awards to apply "in all civil actions," except in class actions, wrongful-death actions, and actions alleging the intentional infliction of physical injury. Section 6-11-21(a), (b), (d), (h), and (j), Ala. Code 1975. Section 6-11-21, Ala. Code 1975, as so amended, has been recognized as a complete replacement of the old statutory restrictions on punitive damages. See *Morris v. Laster*, 821 So. 2d 923, 927 (Ala. 2001).
>
> ... The wording of this statute, i.e., that it applies to "all civil actions," clearly encompasses actions alleging physical injury caused by medical malpractice. Although the Legislature excluded from this statute certain types of claims, the statute makes no mention of excluding actions brought pursuant to the AMLA. Because the Legislature, with knowledge of this Court's holding as to § 6-5-544(b), Ala. Code 1975, enacted a new statutory cap on punitive damages that clearly encompasses claims brought pursuant to the AMLA, we decline Mobile Infirmary's invitation to revisit the *Moore* decision, despite the erosion of its holdings, and to reinstate § 6-5-544(b), Ala. Code 1975.

Id. 884 So. 2d at 813-14 (emphasis added). This same reasoning applies with equal force to *Smith v. Schulte* and § 6-5-547.

Even though § 6-11-21(j), as amended by Act No. 99-358, excludes wrongful death actions from the cap imposed in amended § 6-11-21(a), Act No. 99-358 must nevertheless be likewise construed to have repealed § 6-5-547. Amended § 6-11-21(j) states: "This section shall not apply to

actions for wrongful death or for intentional infliction of physical injury." If the argument were made that the 1999 Legislature intended for § 6-5-547 to continue to apply to medical wrongful death claims, the same logic would require the conclusion that the legislature intended for § 6-5-544(b) to continue to apply to medical personal injury claims where the doctor intentionally inflicted physical injury on the patient. Under such reasoning, the $250,000 cap of § 6-5-544(b) would apply if a doctor intentionally injured his patient, but the $500,000/"three times compensatory damages" cap of amended § 6-11-21(a) would apply if the doctor only *wantonly* injured the patient. The absurdity of such a conclusion shows that the 1999 legislature had not thought of preserving the separate medical liability caps simply because of the manner in which it drafted amended § 6-11-21(j).

In *Alabama Power Co. v. Turner*, *supra*, the Court commented on the legislature's determination not to cap wrongful death damages when the Court rejected a federal due process challenge to *former* § 6-11-21's exclusion of wrongful death actions from such caps:

> The exception of wrongful death actions from legislation restricting punitive damages is warranted, because wrongful death actions differ critically from the actions to which the restrictions apply. ...

> The protection of the lives of its citizens is certainly a legitimate state interest. By allowing punitive damages to be assessed against defendants in wrongful death actions in a manner different from the way punitive damages are assessed in other civil actions, the legislature has undoubtedly recognized that no arbitrary cap can be placed on the value of human life and is "attempt[ing] to preserve human life by making homicide expensive."

Id., 575 So. 2d at 556, quoting *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927) (emphasis added).

In sum, our legislature has *always* elected to treat wrongful death actions differently, and this Court has consistently deferred to the legislature's prerogative. This is yet another reason why if this Court elects to address this issue at all in this opinion it ought once and for all to declare that § 6-5-547 was repealed by § 6-11-21, as amended, and that the old punitive damages cap legislation will not be resurrected.

In light of the punitive damages legislation passed in 1999, including not only § 6-11-21(j), but also § 6-11-29, which precludes caps on wrongful death damages, it no longer matters whether § 6-5-547 was or is constitutional or unconstitutional. That *former* statute no longer has any force or effect. This Court has considered identical arguments numerous times and rejected them each and every time. The holdings in

Schulte, *Hodgen*, *Tyler* and *Gillis* remain precedential, SMH/ACJRC have not asked this Court to overrule *Hodgen* or *Tyler* or *Gillis*, and prudence weighs against again becoming embroiled in the old hot-button political tort reform acrimony of decades ago, especially where, as here, there is no showing that the § 6-5-547 issue was *ever* timely or adequately raised below but only surfaced after the jury returned its verdict, judgment was entered upon that verdict and new appellate counsel appeared on the scene.

VIII. The Remittitur Order Is Fair and Just and Consistent In All Respects With The Commands Of *BMW v. Gore*, *Hammond* and *Green Oil* .

While Mrs. West opposed any remittitur of the verdict in the post-judgment proceedings (C. 2957-2997), Judge Pipes in a lengthy and well-reasoned analysis determined that $10 million was, under all the circumstances presented, the amount reasonably necessary to punish SMH for conduct the court deemed "highly reprehensible," and to deter SMH and other hospitals from engaging in similar misconduct in the future, while not exceeding SMH's right to not be punished too severely for the misconduct as found by the jury.

Because the circuit court's reasoning was fair and just and consistent with the commands of *BMW v. Gore*, *Hammond* and *Green Oil*, Mrs. West elected not to cross-appeal the remittitur order.

1. SMH's New Remittitur Arguments Fail To Demonstrate Error .

To begin with, SMH has its facts all wrong. At Brf., p. 53, SMH contends there is no reprehensibility because Nurse Elenwa administered what Dr. McAndrew prescribed, *i.e.*, 4 mg of Dilaudid. But this assertion ignores the true facts and the way SMH's trial counsel tried and defended the case. Plaintiff's theory at trial was that Nurse Elenwa was negligent in violating Dr. McAndrew's prescription order in multiple ways, including: 1) she administered two 4 mg doses of IV Dilaudid *without first giving Mr. West a Percocet tablet in an effort to manage his pain*, in violation of Dr. McAndrew's order; 2) she administered the two 4 mg IV doses of Dilaudid within two hours of one another, again in violation of Dr. McAndrew's order; and 3) she administered a 4 mg dose initially, when all the expert testimony and medical literature commands that for opioid-naive patients like Mr. West, the starting dose should be .2 mg to no more than 1 mg and then adjusted upwards if that smaller dose is ineffective in managing the pain, which, again was contrary to Dr.

McAndrew's order which directed Mr. West could be administered "up to 4 mg" PRN ("as needed"). Nurse Elenwa categorically did not give the Dilaudid as prescribed.

Moreover, the jury heard Nurse Elenwa testify, contrary to the medical record which SMH admitted by stipulation was accurate (R. 176-177), that *she never gave Mr. West any Dilaudid at all*. R. 1146. Nurse Elenwa lied.[43] Mrs. West proved Nurse Elenwa's fingerprint was literally used on the Omnicell to dispense the 4 mg of Dilaudid twice on the evening she was caring for Mr. West. Then, in her deposition, Nurse Elenwa admitted that if she *had* given 8 mg of Dilaudid in less than 2 hours (as the medical record showed), it would be an "egregious" and "gross" violation of the standard of care. R. 1152-1153. Nurse Elenwa testified "4 mg IV Dilaudid within that time frame is a lot." R. 1161. "Oh my God. That's a lot of medicine." R. 1457. "That's excessive." R. 1141. "It is ridiculous." R. 1161. "That's not an appropriate dose to be given." R. 1170. "This is unacceptable." R. 1170. "There is no logic behind it." R.

[43] The circuit court instructed the jury – again without objection by SMH – in conformance with APJI-3d no. 15.14 that it could disregard the testimony of any witness if it concluded the witness testified falsely under oath. R. 3051.

1162. "We'd be coding that patient." R. 1170. "It don't make no sense." R. 1162.

As for SMH's declaration (Brf., p. 54) "that the dose prescribed to Mr. West was consistent with what other physicians prescribed for other patients," suffice it to say that this amounts to no more than cherry-picking of testimony from its witnesses which was obviously rejected by the jury and the circuit court. Dr. Rothfield, Plaintiff's opioid hospital safety expert testified: "this is the most egregious overdose I've seen in the most unsafe setting I have ever seen of any case I've ever reviewed." R. 890-891. Dr. Lewis Nelson, MD, this Country's foremost authority on medical toxicology testified it was "an extremely high dose." R. 1384-1385. Dr. Spires testified he "would never give a dose like that" as it would be "five to six times the amount of medication [I have] ever given a patient." R. 1736-1737. Nurse Levin testified it was an "outrageous amount of medication for an opioid-naive individual, really for anyone for Dilaudid" (R. 1535) and characterized it as "an egregious" and "gross" violation of the standard of care. R. 1536.

As for SMH's suggestion (Brf., p. 54) that Nurse Elenwa's administration of the second 4 mg dose was an "isolated mistake," this

again ignores the evidence that it was administered in a way which repeatedly violated Dr. McAndrew's orders, which deviated below the requirements of the standard of care (as shown by the expert testimony, medical literature and the Nurse Practice Act) and that afterwards Nurse Elenwa lied about it. This wasn't some simple momentary lapse in judgment, it was an egregious violation of the standard of care at many levels. SMH's wistful prose cannot change the facts as found by the jury.

With respect to SMH suggesting now (Brf., p. 55) that it "stood behind the accuracy of its medical records," this turned out to be true, but it was only after a lengthy fight during the pre-trial proceedings where its trial counsel attempted initially to imply that Nurse Elenwa was telling the truth and the medical records could be wrong. R. 180. It was only after the circuit court ruled that SMH could not have its cake and eat it too – given its formal response to Plaintiff's request for admissions (which established the accuracy of the medical record) – that SMH's trial counsel backed away from that strategy. R. 185.

And as for SMH's new attempt to distance itself from the perjurious testimony of its former nurse (Brf., p. 55), it is significant that it fails to cite <u>any</u> case law from <u>any</u> court, from <u>anywhere</u> holding that a principal

may be exonerated when its employee lies about killing someone within the line and scope of employment.

SMH seeks further remittitur by arguing that this Court should sit as a 13th juror and disregard the jury's fact-finding relative to SMH's disregard of the requirements of the standard of care for *decades* before Mr. West's death. *De novo* review does not mean jury nullification. Mrs. West supported her claims against SMH with a super-abundance of medical literature and expert testimony from the country's foremost experts on the subject who uniformly criticized SMH's abject failure to implement any policy, any procedure, and failed to afford any education or training to any of its nurses about the absolute necessity of monitoring such patients in those circumstances. Another example of the powerful testimony the jury heard comes from Plaintiff's Chief Nursing Officer expert Kim Arnold:

> Q. Now, despite the patient safety literature that we looked at here today from all these organizations, based on your review of the case, were you able to identify a single thing that Springhill Medical Center's CNO did to proactively protect patients who are in the hospital post-operatively getting IV opioids from being killed by opioid induced respiratory depression?
>
> **A. Not one single thing**.

Q. In June of 2014, did the hospital have in place a single IV opioid administration policy?

A. No.

Q. Did they have a single monitoring policy?

A. No.

Q. Did they have a single respiratory assessment policy?

A. They did not.

Q. Did they have a single dosing guideline?

A. No.

Q. Did they have a single sedation assessment policy?

A. Nope.

Q. Did they have a single policy or procedure on electronic monitoring?

A. They did not.

Q. At Springhill Medical Center in June of 2014, did they have any training in place for the nurses on IV opioid safety?

A. No.

Q. On how to identify patients at high risk for OIRD?

A. No.

Q. On administering high risk medication?

A. No.

Q. On dosing guidelines for IV opioids?

A No.

Q. On how to protect patients from OIRD?

A. No.

Q. Any training on the use of electronic monitoring?

A. No training.

Q. As of June 2014, did the standard of care require a hospital CNO to implement those measures that I just walked through with you in order to protect patients?

A. Yes.

Q. Do you have an opinion as to whether Springhill Medical Center's CNO violated the standard of care in that regard?

A. Absolutely. It was a violation.

R. 1039-1041.

It would be wholly inappropriate to accept SMH's repeated contention that "the majority of hospitals" were not using continuous pulse oximetry in 2014. The opposite is true (see additional testimony from Dr. Rothfield (R. 803-806); Barbara Levin, RN (R. 1598); SMH's CNO Paul Read (R. 926, 928, 939, 952); and SMH's Quality Assurance

and Risk Manager Eleanor Odom (R. 902)). No amount of repeating such false contentions in an appellate brief can change the truth as found by the jury.

There certainly was no error in the circuit court's finding (C. 4359-60) that SMH's conduct was highly reprehensible for failing to have a monitoring policy in place. It mattered not to the jury or to the circuit court that SMH had monitoring available in certain places within the hospital: the point is that SMH breached the standard of care by not having monitoring available *throughout the hospital* so that safety of its patients was not "*optional*."[44]

A jury's verdict is sacrosanct, especially in Alabama where the jury is charged pursuant to APJI 3d – Civil No. 11.28 to determine the sum of money necessary to accomplish the societal purposes of punishment and deterrence and to derive that sum by weighing how bad the defendant's conduct was. In this case, the jury was charged in conformance with that

[44] If SMH believed Dr. McAndrew was responsible for Mr. West's death in not ordering post-surgical monitoring, it could have cross-claimed against him, but it did not. Further, it offered no expert testimony from any witness qualified by § 6-5-548(c) to criticize Dr. McAndrew, and its efforts to elicit such criticisms of Dr. McAndrew from Plaintiff's expert witnesses were rebuffed. R. 858 (Dr. Rothfield), R. 1436-1437 (Dr. Nelson).

pattern charge without objection or exception from SMH, thereby making that charge the law of the case. *ALDOT v. Land Energy*, 886 So. 2d 787, 795-796 (Ala. 2004). Accordingly, an Alabama jury's wrongful death verdict is its collective finding of fact about how bad the defendant's conduct was. No opinion from this Court has ever hinted that *de novo* review means the reviewing court may substitute its judgment for a wrongful death jury's factual findings.[45] What the Court reviews *de novo* is the *amount of the verdict* and whether it punishes the defendant too severely given the factors outlined in *BMW*, *Hammond* and *Green Oil*.

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[45] *De novo* review derives from *Acceptance Ins. Co. v. Brown*, 832 So. 2d 1, 24 (Ala. 2001) where this Court followed language from *Cooper Indus. v. Leatherman Tool*, 532 U.S. 424 (2001) that "[w]hile … the [appellate court] must review the District Court's application of the [*Gore*] guideposts *de novo*, it … should *defer* to the District Court's *findings of fact* unless they are clearly erroneous." *Id.*, 532 U.S. 540, n. 14. The *Cooper Industries* Court made this same point twice: ("…nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard ['specific findings of fact']. See, e.g., *Gore*, 517 U.S. at 579-580." *Id.*, 532 U.S. 440, n. 12. If the Seventh Amendment precludes reviewing courts from second guessing factual findings in punitive damages cases generally, Art. I, § 11 must be construed by this Court to preclude second guessing of an Alabama wrongful death jury's findings of fact regarding how bad the defendant's conduct was specifically.

2. SMH's Reprehensibility Analysis Ignores The Evidence Of Its Own Decades-long Disregard Of The Requirements Of The Standard Of Care.

The jury was unquestionably convinced SMH should be punished for its vicarious liability for the wrongful acts and omissions of its employees, CNO Paul Read and Nurse Elenwa. But, the jury was *also* convinced that SMH should be punished for its own institutional negligence in failing to comply with the requirements of the standard of care relative to post-surgical monitoring of patients administered opioids for the management of pain – evidence which SMH's blue brief altogether disregards when arguing for a further remittitur.

Mrs. West outlined some of this evidence in her post-judgment brief, C. 2963-2974, which is incorporated here by reference.

Mrs. West presented evidence from Dr. Rothfield (R. 803, 806, 881), Chief Nursing Officer Kim Arnold, RN (R. 1039-1041), literature from the Anesthesia Patient Safety Foundation (PX 291, 297), American Society for Pain Management Nursing (PX 277), Institute for Safe Medication Practices (PX 251), and the Joint Commission for Accreditation of Hospitals (PX 7, 260, 262), all to the effect that SMH failed to follow even one single patient safety recommendation for post-surgical monitoring

for *decades* before Mr. West's death. Mrs. West also presented admissions from SMH's Rule 30(b)(6) corporate representative, Joe Adkins (R. 1100, 1114, 1117), and its CNO, Paul Read (R. 925, 928, 939, 952), that SMH failed to have a single written policy or procedure in place relative to IV opioid safety for patients before Mr. West's admission. *All this evidence was unrebutted at trial*. SMH did not present *any* standard of care evidence from *any* witness regarding *any* effort to comply with the requirements of the standard of care. It bears repeating yet again what Dr. Rothfield testified about these circumstances:

> …[t]his is the most egregious overdose I've seen in the most unsafe setting I have ever seen of any case I've ever reviewed.

R. 890-891. Judge Pipes summarized this evidence in the post-judgment order, but SMH and its amicus ignore these findings:

> Substantial evidence was admitted at trial that the risk of opioid induced respiratory depression was well known in June 2014 and that SMH implemented no policies and procedures to address the issue. Specifically, SMH failed to implement an IV opioid administration policy, a monitoring policy, a respiratory assessment policy, a dosing guideline, a sedation assessment policy, and a policy on electronic monitoring. SMH had no training in place for its nurses on IV opioid safety, including how to identify patients at high risk for opioid induced respiratory depression, on how to administer high risk medication, and on dosing guidelines for IV opioids. Pursuant to Plaintiff's nursing expert Kim Arnold, the standard of care in June 2014 required the Chief Nursing

> Officer at SMH to implement all of these measures, and the failure to do so was a violation of that standard of care. Plaintiff's expert Dr. Kenneth Rothfield stated he had "never seen a hospital without a medication safety program and awareness of the dangers of opioids until I became involved in this matter." Tr. 806. Various safety organizations, including the Joint Commission, recommend most or all of these measures. SMH admitted it did none of them.

C. 4359-4360. *Nowhere* does SMH's blue brief even attempt to demonstrate how this part of the post-judgment order is erroneous.

With respect, SMH should not now be rewarded with a further remittitur of the judgment when its arguments for less punishment literally ignore the most damning evidence against it.

3. Evidence of Concealment, Cover-up & Deceit.

SMH's reprehensibility argument also skips over the evidence the jury heard about Nurse Elenwa's concealment, cover-up and deceit and SMH's effort to intimidate a witness. Mrs. West discussed this evidence in her post-judgment briefing. R. 2974-2978. The circuit court agreed these facts were material to reprehensibility. C. 4360-4361. That SMH elects now to ignore this additional evidence of reprehensibility should not be rewarded with any further remittitur.

Relative to Nurse Elenwa's own deviations from the standard of care, Judge Pipes concluded:

> Virtually every expert testified Mr. West received an extremely high dose of Dilaudid (8 milligrams within one hour and fifty-one minutes). Dr. Kenneth Rothfield, Plaintiffs IV opioid hospital patient safety expert testified that it was "the most egregious overdose I've seen in the most unsafe setting I have ever seen of any case I've ever reviewed." Tr. 890-91. Dr. Lewis Nelson, a medical toxicologist characterized the dose as "extremely high." Tr. 1384-1385. Dr. Jim Spires, a local physician and the former Chief of Medical Staff at SMH testified as an expert for Mrs. West without compensation. He testified that "he would never give a dose like that" and that it would be "five to six times the amount of medication [he has] ever given a patient." Tr. 1736-1737. Finally, and significantly, Nurse Jane Elenwa, despite all evidence to the contrary, denied administering the two doses to Mr. West, because, in this Court's opinion, she was well aware of how tremendous they were. Despite adamantly denying giving the doses, she described them as "egregious", a "gross violation" of the standard of care, "excessive", "ridiculous", "not appropriate", "unacceptable", and she went on to say the dosage amounts "[made] no sense", and that if given "we'd be coding the patient" which is exactly what happened. Unlike her testimony denying her involvement, this testimony was believable.

C. 4358-4359. Simply put, Nurse Elenwa unquestionably administered the fatal overdoses of Dilaudid, failed to monitor Mr. West for respiratory depression for hours afterwards and then lied about her conduct when deposed. Judge Pipes expressly commented upon the significance of all this evidence:

> SMH's direct employee, Nurse Elenwa, administered the two fatal Dilaudid doses. Despite overwhelming evidence to the contrary, Nurse Elenwa adamantly denied administering any

> Dilaudid to Mr. West and insisted the electronic medical records ("EMR") were incorrect and had been altered. However, based on the data entry procedures for the EMR and the records from the medication cart this testimony was obviously false. SMH eventually stipulated that the medical records were accurate, including those portions of the records showing Nurse Elenwa administered the Dilaudid.
>
> Evidence was also admitted that Mr. West's estate was charged for five doses of Narcan, an opioid reversal agent. Despite being charged for these doses, there was no entry in Mr. West's chart of anyone ever administering them to him. The Narcan doses were a contested issue prior to trial. Because cause of death was contested, (SMH argued Mr. West died from a completely unrelated cardiac event), the Court allowed Plaintiff to introduce evidence that the Narcan doses were missing from Mr. West's crash cart after he died because it was relevant to Plaintiff's theory that he overdosed on Dilaudid. An opioid overdose is the only reason to administer Narcan; there is no other reason to give it. The Court found it more than coincidental that these opioid reversal agents were missing from Mr. West's crash cart after he died, that *he was actually billed for them,* that the alleged (and disputed) cause of death was an opioid overdose, and that there was no entry in his chart of ever receiving them.

C. 4360-4361.

The jury also heard from Mobile surgeon Dr. James Spires, who maintains his office on the campus at SMH, and who testified on behalf of Mrs. West without compensation on the issue of medical causation. Dr. Spires testified that SMH's CEO, Jeff St. Clair, attempted to chill his testimony by attending his deposition (Mr. St. Clair attended only one

deposition out of the 48 depositions taken in this case) and that thereafter SMH eliminated his elective surgical time such that Dr. Spires was at the time of trial still being forced to drive across town to Mobile Infirmary to perform his surgeries as the price he now has to pay because SMH retaliated against him for testifying. R. 1755.

This Court has never tolerated lying or witness intimidation. *See, e.g.*, *Atkins v. Lee*, 603 So. 2d 937, 948 (Ala. 1992); *Campbell v. Williams*, 638 So. 2d 804, 817 (Ala. 1994); *ConAgra v. Turner*, 776 So. 2d 792, 797 (Ala. 2000); *Orkin v. Jeter*, 832 So. 2d 25, 41 (Ala. 2001); *Target Media v. Specialty Mktg.*, 177 So. 3d 843, 880 (Ala. 2013). This case should be no different.

4. Ratio Of Punitive Damages To Compensatory Damages.

SMH erroneously asserts (Brf., p. 60) "[t]he second *BMW* guidepost has no application here." SMH is wrong again. This Court in *Tillis Trucking Co. v. Moses*, 748 So. 2d 874, 890 (Ala. 1999) described the ratio analysis in wrongful death cases this way:

> Alternatively, one could say that it does not apply as a mathematical ratio, but, if one considers the purpose behind this factor, it applies in the sense of proportionality between the punitive-damages award and the harm that was caused or was likely to be caused by the defendants' conduct.

Id. In *McKowan v. Bentley,* 773 So. 2d 990 (Ala. 1999), the Court further held "the punitive-damage award in this case is not disproportional to the loss of life caused by the defendant's malpractice." 773 So. 2d at 998.

It is repugnant for SMH to suggest that a $10 million verdict is "too much" for causing the needless death of a healthy, robust 59-year old man, husband and father.

5. Duration.

The post-judgment order recites:

> The duration of the misconduct involving Mr. West was only about fourteen hours. He drove himself to SMH on the afternoon of June 4, 2014 and died early the next morning on June 5. However, the risks involved, and the failure to implement those policies listed above were well known for quite some time, including in 2012 when Sentinel Alert 49 was issued.

C. 4360, p. 13. Nothing in SMH's blue brief refutes these observations.

6. Awareness Of The Hazard.

The post-judgment order highlights SMH's admissions that it was aware of the risk of harm from opioid-induced respiratory depression for years before Mr. West's death:

> SMH admitted at the time of Mr. West's death it had been aware of opioid induced respiratory depression for years, including the emphasis on creating a safety program and

> policies and procedures to address the issue, and that it did not create those programs and policies. SMH's employees testified that the failure to do so was "not acceptable," and agreed that in retrospect there should have been a policy for continuous pulse oximetry monitoring for high risk patients receiving IV opioids. Tr. 902-03; 938.

C. 4360. Again, SMH ignores these findings.

7. Costs of Litigation.

Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1220 (Ala. 1999) and other opinions counsel that plaintiff's costs of litigation are a factor to consider in determining whether the award as remitted is ultimately justified. In this case, Plaintiff's counsel expended $323,438.95 (C. 3681-3683). As found by the circuit court, "[t]his guidepost is especially important in a wrongful death action wherein plaintiff's counsel is almost always engaged under a contingency fee contract and fronts all litigation expenses" because "the attorney assumes the risk of non-payment for expenses and is acting at his own peril" C. 4367, quoting *Madison County v. T.S.*, 53 So. 3d 38, 56 (Ala. 2009). Judge Pipes concluded "[t]his amount is extremely high, and outweighs any amount incurred in a medical liability case to the undersigned's knowledge. It is well accepted within the legal community that it is very difficult to prevail as a plaintiff in a medical liability case. They are notoriously expensive to pursue, and, to

the undersigned's personal knowledge, they are zealously defended, almost exclusively by seasoned and capable trial counsel." C. 4367-4368. Judge Pipes concluded "[b]ecause of the sums spent, the time invested, the high stakes risk involved, and the need to encourage others to bring similar suits, this guidepost weighs against remittitur." *Id*.

SMH has shown no reason why Judge Pipes' conclusions are wrong.

8. SMH's Attempt To Shift The Blame.

During the trial, and again in the post-judgment proceedings, SMH attempted to shift the blame for Mr. West's death from its own and its nurses' deviations below the requirements of the standard of care to what it characterized as deviations below the standard of care by Dr. McAndrew and the anesthesiologist who screened Mr. West prior to surgery. SMH argued that Dr. McAndrew was at fault in not ordering post-surgical monitoring and that his order for post-surgical pain management was unclear. SMH argued the anesthesiologist bore fault for not ordering post-surgical monitoring as well.

Mrs. West argued in opposition to these contentions. C. 2429-2432; R. 2882-2888, 3313-3317, 3334-3340. She asserted 1) SMH waived these contentions when it elected not to assert any cross-claims against other

healthcare providers; 2) even if it had asserted cross-claims, there is no apportionment of punitive damages in Alabama; 3) liability would be joint and several in any event; and, 4) any such suggestion of shared fault would necessarily be speculative and unsubstantiated because the jury was never asked to make any such determination.

Judge Pipes *rejected* SMH's contentions. C. 4362-4363. Again, SMH fails to demonstrate how this reasoning is erroneous. Whatever Dr. McAndrew did or did not do should have no bearing on this Court's remittitur analysis.

9. Conclusion As To Reprehensibility.

The circuit court expressly concluded that SMH's "level of reprehensibility was high" in causing Mr. West's death.

> In sum, the reprehensibility factor weighs for remittitur, but only due to the unusually large amount of the jury's award. Mr. West drove himself to the SMH emergency room after cutting the tip of his left thumb with a table saw, he successfully underwent a twenty-minute surgery and there was every indication he would recover. Instead, he unexpectedly died approximately fourteen hours after arrival. There is substantial evidence that Mr. West lost his life due to the failure to implement policies and procedures to prevent well known hazards, and that the failure to do so violated the standard of care. As in *Bednarski, supra*, this case arose in a healthcare setting, in which the patient was completely reliant on the provider to care for him. Instead, Mr. West was administered a massive overdose of IV Dilaudid, causing him

> to die of respiratory failure, in a hospital with insufficient safeguards and procedures, and by a nurse who did not follow the physician's orders, who was not properly trained, and who very obviously lied under oath about giving the drug at all. This was not a mere accident. The level of reprehensibility is high.

C. 4263-4264. Again, SMH ignores these conclusions offering this Court only its own view of the trial evidence and inferences which were rejected by the jury and the circuit court. *De novo* review in a wrongful death-punitive damages case is review of the amount of the judgment, not a second guessing of the facts as found by a jury. Were that the standard, Art. I, § 11's guarantee of the right to trial by jury would be a meaningless empty promise.

10. "Fair Notice."

SMH and its amicus devote considerable effort (Blue Brf., pp. 60-65; BCA Amicus Brf., pp. 16-19) in arguing for further remittitur through trying to change the paradigm for considering comparable prior verdicts. In the post-judgment proceedings, SMH went so far as to argue that its right to due process against an excessive punitive damages award *exceeded* a victim's right to recovery in the first instance. C. 2834-2836. SMH now argues it did not have fair notice that it was at risk of punishment for anything more than $2 million for its decades-long

disregard of the requirements of the standard of care in protecting its patients. Under SMH's theory, wrongful death cases are now dog bite cases: defendants are entitled to a free bite before they really truly can be punished by a jury's verdict. In SMH's view, there has to be a prior reported affirmed verdict on identical facts before it can be held accountable for engaging in that same conduct afterwards.

This is not the way this Court has analyzed punitive damages awards, *ever*. SMH, like every citizen and business in Alabama has known since the 1850's of the risk of incurring punishment if found liable for proximately causing death. That potential liability only became harnessed in 1987 when this Court was first to recognize the due process protections against excessive punishment in *Hammond v. City of Gadsden* and later in *Green Oil Co. v. Hornsby*, opinions expressly approved of by the Supreme Court of the United States in *Pacific Mutual v. Haslip* in 1991, five years *before* that Court followed suit in *BMW of North America, Inc. v. Gore*. Simply stated, SMH has known – just like all Alabama's citizens and businesses have known – of the need to safeguard against causing death, that Alabama law punishes those who

nevertheless cause death and that there is no fixed cap or limit on the amount by which one may be so punished.

Furthermore, to do as SMH now asks would require this Court to reverse a decision less than one year old, *Bednarski v. Johnson*, No. 1200183, 2021 WL 4472478, ___ So. 3d ___, (Ala. Sept. 30, 2021) which, contrary to SMH's proposed rule, considered a pre-*BMW* case as part of its comparator analysis. *Bednarski*, 2021 WL 4472478, at *19. As Justice Gorman Houston is fondly remembered for stating: "stare decisis should be made of sterner stuff than this year's fabric."[46]

Same deal with SMH's/BCA's "fair notice" argument about whether inflation really is a "thing." Mrs. West briefed the inflation factor below (C. 2982-2988) citing pertinent analogous caselaw.[47] In the post-judgment proceedings, Mrs. West called preeminent University of Alabama Economics Professor Robert McLeod, PhD to testify about the

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[46] *Lowman v. Piedmont Exec. Shirt Mfg. Co.*, 547 So. 2d 90, 96 (Ala. 1989) (Houston, J., concurring in part and dissenting in part).

[47] SMH's entire pre-BMW/no-inflation "fair notice" argument can be understood as no more than an effort to water down the significance of the $14.5 million present value of this Court's affirmed $6.875 million medical negligence/wrongful death judgment in *Atkins v. Lee*, 603 So. 2d 931 (Ala. 1992).

impact of inflation generally and its impact upon prior comparable wrongful death judgments in particular. (R. 3234-3267). SMH offered no witness in opposition and there is nothing before this Court refuting Professor McLeod's opinions.

Inflation is real. Its impact over time is real. Professor McLeod explained all this. Yes, SMH's blue brief, like that of its amicus, fail to cite any authority from any appellate court anywhere supporting the notion that courts should close their eyes to the reality of the impact of inflation.[48] Ignoring economic reality should not be the basis for an opinion from this Court now or ever.

Mrs. West also showed what other states' appellate courts have recently done when affirming wrongful death awards. C. 2988-2991 (listing recent affirmed awards of $165 million, $38 million, $61 million, $32 million, $30 million, $25 million, $50 million, $21 million, $79.5 million, $26.5 million, $26.5 million and $15 million). Alabama's affirmed wrongful death awards are below the very bottom of this spectrum which

[48] Mrs. West attaches as Appendix Exhibit E a comprehensive article regarding the effect of inflation relative to the comparable verdicts analysis by prominent attorney Richard Riley – The Effect of Inflation on Alabama Wrongful Death Verdicts, 43 Am. J. Trial. Adv. 361.

seems incredibly inconsistent with the accepted purpose of our wrongful death remedy resting "upon the Divine concept that all human life is precious." *Estes Health v. Bannerman*, 411 So. 2d 109, 113 (Ala. 1982).

Perhaps the best evidence of what this Court should affirm comes from SMH's own appellate attorney who argued to the circuit court "…it's hard to imagine in Alabama under our current case law an amount above $20 million being affirmed." C. 2291. The remitted $10 million judgment in this case is well within the range contemplated as acceptable by SMH's appellate attorney.

11. Financial Impact of the Verdict on the Parties.

SMH's blue brief whisks past this factor with a mere footnote (Brf., p. 67, n. 22) which states only that SMH "is not relying on the financial-position factor" as a ground for remittitur. Citing *Ex parte Vulcan Materials Co.*, 992 So. 2d 1252, 1260-1261 (Ala. 2008), SMH concedes, as it must, "[t]hat factor thus weighs against remittitur." *Id.*

Wilson v. Dukona Corp., 547 So. 2d 70, 73 (Ala. 1989) counsels "[t]he defendant's financial position is … essential" to any review of a punitive-damages verdict for excessiveness. To that end, Mrs. West served post-judgment discovery upon SMH inquiring about its financial status and

the impact an affirmance of the $35 million verdict or anything below that amount might have upon its financial status. In response, SMH waived adverse financial impact as a factor the circuit court should consider in determining whether the jury's verdict punished it too severely. C. 3626-3633. But waiving the financial impact factor does not mean that a reviewing court should *disregard* that factor. On the contrary, SMH's election to not answer discovery about financial impact and the limits of its liability insurance with Inspirien Insurance Company must be construed to mean it can pay the entire judgment without suffering any adverse financial impact. In other words, by waiving adverse financial impact, SMH told the circuit court, like it is now telling this Court: SMH has available assets and liability insurance such that it can pay the judgment in full without feeling any "sting," much less suffer so much adverse financial impact that its rights to due process are implicated.

Indeed, the record reflects SMH posted a supersedeas bond with sureties and additional cash to stay execution of the judgment. C. 2688, C. 2692. The circuit court expressly approved this combination of bond and cash. C. 2696. In *Killough v. Jahandafard*, 578 So. 2d 1041, 1047

(Ala. 1991), this Court, under similar circumstances, noted it was significant that a verdict was superseded in that it constituted substantial evidence the defendant could pay the judgment in full without suffering undue financial hardship ("… the fact that the judgment against its insured has been superseded at its expense is material to the argument that the verdict, if not reduced, will have a devastating effect on the insured, an effect sufficient to destroy him financially.").

CONCLUSION

The judgment of the Mobile Circuit Court should be affirmed. Judge Pipes' post-judgment order is fair and just and entitled to great deference just as this Court has consistently held in previous cases:

> "[T]he trial judge is better positioned to decide whether the verdict is so flawed. He has the advantage of observing all the parties to the trial – plaintiff and defendant and their respective attorneys, as well as the jury and its reaction to all of the others. There are many facets of a trial that can never be captured in a record, so that the appellate courts are at a special disadvantage when they are called upon to review trial court action in this sensitive area, although increasingly they are required to do so."

Killough, 578 So. 2d at 1046, quoting *Hammond v. City of Gadsden*, 493 So. 2d at 1378.

The jurors who sat for two weeks and heard all the testimony from 27 witnesses and learned of medical standards from dozens of exhibits were obviously displeased with SMH's conduct and that of its CNO and floor nurse. Sure, $35 million is a lot of money, but sometimes it takes a lot of money to effectuate change. The jury did its job and there is no showing otherwise.

Judge Pipes then afforded SMH all the due process protections against excessive punishment afforded by law. The civil justice system worked, as intended.

In the end, this case was hotly contested but cleanly tried before a seasoned trial judge. Mrs. West prevailed after seven years of SMH's defend-at-all-costs tactics. It is time for this to be over. The judgment as remitted should be affirmed.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitation set forth in Ala. R. App. P. 28(j)(1). According to the word-count function of Microsoft Word, the brief contains 20,727 words from the Statement of the Case through the Conclusion. I further certify that this brief complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The brief was prepared in the Century Schoolbook font using 14-point type. *See* Ala. R. App. P. 32(d).

_____
Counsel for Appellee

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 27th day of October, 2022, filed the foregoing with the Clerk of the Court via the Alabama Appellate Court Electronic Filing system, and that the following parties have been served a copy of same either by electronic mail and/or by United States mail, first-class postage prepaid:

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APPENDIX

Exhibit A – Roster of witnesses.

Exhibit B – C. 4348-4369 – Order on Post-judgment Motions.

Exhibit C – Constitutional Provisions and Statutes relied upon in Appellee's Brief.

Exhibit D – Plaintiff's Trial Exhibits.

Exhibit E – Richard Riley, The Effect of Inflation on Alabama Wrongful Death Verdicts, 43 Am. J. Trial. Adv. 361.

EXHIBIT A

ROSTER OF WITNESSES

Plaintiff's Witnesses:

1. **Kenneth Rothfield, MD** – Chief Medical Officer at Texas Health Arlington Memorial Hospital in the Dallas/Fort Worth, Texas area and nationally recognized IV opioid hospital patient safety expert who was offered as Plaintiff's expert witness on IV opioid hospital patient safety. Tr. 707-895. PX 119 – Curriculum Vitae.

2. **Paul Read, RN** – SMH's Vice President and Chief Nursing Officer. Tr. 915-952. PX 51 – Curriculum Vitae.

3. **Janise Banks, RN** – SMH's Director of Clinical Education and Rule 30(b)(6) representative. Tr. 953-964.

4. **Eleanor Odom, RN** – SMH's Quality and Risk Management Coordinator. Tr. 965-975.

5. **Kimberly Arnold, RN** – Chief Nursing Officer at Northwest Medical Center in Bentonville, Arkansas proffered as Plaintiff's expert witness on a chief nursing officer's standard of care. Tr. 977-1088. PX 121 – Curriculum Vitae.

6. **Joe Adkins** – SMH's Director of Pharmacy and Rule 30(b)(6) representative. Tr. 1095-1122.

7. **Jane Elenwa, RN** – SMH's nurse who administered the fatal overdose to Mr. West. Tr. 1123-1251.

8. **Alan Babcock, MD** – SMH's emergency department physician who responded to Mr. West's code and ultimately pronounced his death. Tr. 1254-1302.

9. **Lewis Nelson, MD** – the foremost authority on medical toxicology in the United States from Rutgers University proffered as Plaintiff's expert witness on medical toxicology. Tr. 1323-1470. PX 384 – Curriculum Vitae.

10. **Barbara Levin, RN** – 37-year registered nurse with Massachusetts General Hospital in Boston, Massachusetts proffered as Plaintiff's expert witness on orthopedic and medical surgical nursing. Tr. 1471-1606. PX 382 – Curriculum Vitae.

11. **John C. McAndrew, MD** – orthopedic surgeon with Alabama Orthopedic Clinic who performed the surgery on Mr. West's left thumb. Tr. 1635-1721. PX 97 – Curriculum Vitae.

12. **James Spires, MD** – ear, nose and throat surgeon and former SMH Chief of Medical Staff with Premier Medical Eye, Ear, Nose & Throat on the campus of Springhill Memorial Hospital proffered by Plaintiff on the issue of causation. Tr. 1723-1791. PX 386 – Curriculum Vitae.

13. **J. Elliot Carter, MD** – Board Certified Pathologist at the University of South Alabama Medical Center proffered by Plaintiff to discuss Mr. West's autopsy results. Tr. 1800-1865.

14. **Monique Hawkins, RN** –SMH's corporate representative for trial. Tr. 1873-1876.

15. **Patricia West** – Plaintiff. Tr. 1876-1897.

16. **Richard Neal Mitchell, MD** – Board Certified Anatomic Pathologist at Harvard Medical School and expert in cardiac pathology. Tr. 1904-2034. PX 118-A – Curriculum Vitae

Defendant's Witnesses:

17. **Joanne Edwards, RN** –SMH's nurse who treated Mr. West pre-operatively and in the Post-anesthesia Care Unit. Tr. 2056-2095.

18. **Monique Hawkins, RN** – SMH's trial representative. Tr. 2095-2149.

19. **Karen Wilson** – SMH's Administrative Assistant. Tr. 2152-2170.

20. **Brandy Mobley, RN** – SMH's expert witness concerning nursing standard of care. Tr. 2170-2288.

21. **Maresha French Ogbonna** – former SMH Patient Care Tech. Tr. 2297-2315.

22. **Andrew Michael Baker, MD** – SMH's expert witness concerning forensic pathology). (Tr. 2316-2432).

23. **Craig James Beavers, Pharm. D.** – SMH's expert witness concerning pharmacy standard of care. Tr. 2435-2515.

24. **Gayle Nash, RN** – SMH's expert witness concerning Joint Commission requirements. Tr. 2586-2646.

25. **Hugh Grosvenor Calkins, MD** – SMH's expert witness concerning Cardiology. Tr. 2647-2737.

26. **Elizabeth Wilson** – SMH's Clinical Systems Manager. Tr. 2786-2796.

27. **Pamela J. Sims, Pharm. D.** – SMH's expert witness concerning pharmacokinetics. Tr. 2797-2875.

EXHIBIT B

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CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
JOJO SCHWARZAUER, CLERK

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Patricia Bilbrey West, as Administrator and Personal Representative of the Estate of John Dewey West, Jr., Deceased Plaintiff,	)	
V.	)	Case No.: CV-2016-901045.00
Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital, Defendant.	)	

ORDER ON DEFENDANT'S POST-JUDGMENT MOTIONS

This matter is before the Court on the Defendant's renewed motion for judgment as a matter of law, motion for new trial, motion for statutory reduction, motion for remittitur, and motion for constitutional reduction of punitive damages (doc 981). A hearing was held on June 16, 2022. Based upon the motion, briefs in support thereof, briefs in opposition, the relevant law and facts, and the arguments of counsel, the Court finds as follows:

This medical liability wrongful death action was filed on May 20, 2016 arising out of the June 5, 2014 death of John Dewey West, Jr., while admitted at Defendant Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital ("SMH"). Trial began on February 7, 2022 and on February 22, 2022 the jury returned a verdict in favor of Plaintiff Patricia Bilbrey West as Administrator and Personal Representative of her husband's estate against SMH in the amount of thirty-five million dollars ($35,000,000.00). Judgment was entered on the verdict the same day (doc 951).

On March 24, 2022, within the time allowed by Ala. R. Civ. P. 50 and 59, SMH filed its post-trial motion wherein it 1) renewed its motion for judgment as a matter of law pursuant to Ala. R. Civ. P. 50; 2) alternately moved for new trial pursuant to Rule 59(a); 3) alternately moved for statutory reduction of the judgment pursuant to Ala. Code § 6-5-547 and Rule 59(e); 4) alternately moved for remittitur of punitive damages pursuant to Rule 59(f); and 5) moved for a constitutional reduction of the punitive damages award under the United States Constitution and the Alabama Constitution (doc 981).[1] Since that time SMH has filed several briefs in support of its arguments, Plaintiff has filed her briefs in opposition, and the aforementioned hearing was conducted. The Court has read the post-trial filings of each Party and has studied the arguments of counsel and the law. The Court, through pre-trial arguments and eleven days of trial, heard all of the arguments of counsel, the testimony of each witness, reviewed each exhibit, and observed the candor and demeanor of the witnesses, the Parties and their counsel. The Court also presided over jury selection and observed the conduct, attentiveness, demeanor, and participation of the jurors in voir dire and at trial. The decisions set forth herein are based upon these personal observations, the briefs and arguments of counsel, and the law and the evidence presented to the jury and Court at trial and in these post-trial pleadings.

I. Renewed Motion for Judgment as a Matter of Law

The standard of review on a motion for judgment as a matter of law requires

[1] This fifth basis for relief was apparently subsumed within Springhill Hospital's arguments for new trial when it filed its subsequent brief on May 17, 2022 (doc 1059) and as such it is addressed in that section of this order.

this Court to view the evidence and all permissible inferences in a light most favorable to Plaintiff as the non-moving party, and to deny the motion unless there is a "complete absence of proof."

> "A judgment as a matter of law is proper only where there is a complete absence of proof on a material issue or where there are no controverted questions of fact on which reasonable people could differ and the moving party is entitled to a judgment as a matter of law." In reviewing the denial of a motion for a judgment as a matter of law, this Court is required to view the evidence in a light most favorable to the non-movant…

Liberty Life Ins. Co. v. Daughtery, 840 So.2d 152, 156 (Ala. 2002) (citations omitted).

> "The standard of review applicable to a [JML] or to a denial of a motion for a [JML] is whether the non-moving party has presented substantial evidence in support of his position." *K.S. v Carr,* 618 So.2d 707, 713 (Ala. 1993). "Substantial evidence is of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida,* 547 So.2d 870,871 (Ala. 1989).

Larrimore v. Dubose, 827 So.2d 60,61 (Ala. 2001), quoting *Fleetwood Enters., Inc. v. Hutcheson*, 791 So.2d 920, 923 (Ala. 2000).

> Granting a motion for [JML] is proper "only where there is a complete absence of proof on a material issue or where there are no controverted questions of fact on which reasonable people could differ" and the moving party is entitled to judgment as a matter of law.

Floyd v Broughton, 664 So.2d 897, 898 (Ala. 1995), *quoting Deaton, Inc. v. Burroughs,* 456 So.2d 771 (Ala. 1984).

SMH argues Ms. West failed to present substantial evidence that it 1) negligently trained Jane Elenwa, the nurse who administered the Dilaudid at issue, and 2) had no duty to challenge the admitting doctor's instructions.[2] There is substantial evidence to support each material element of these claims. Specifically, Ms. West presented

[2] SMH raised fifty-eight separate reasons JML should be granted in its March 24, 2022 motion. It has only briefed and argued two of these grounds, and as such the others are not considered.

substantial evidence (from the testimony of the lay and expert witnesses at a trial, the exhibits admitted into evidence, and from the admissions of SMH through its officers, agents, and employees) that SMH negligently trained nurse Elenwa and that she had a duty to challenge the admitting physician's instructions. In doing so the Court rejects SMH's argument that Plaintiff must provide substantial evidence that SMH was on notice of Nurse Elenwa's incompetence prior to Mr. West's death before it can be charged with negligently training her, which in this case includes the allegation that it failed to train her at all in certain areas. Those cases cited by SMH make no distinction between negligent training and negligent retention. See *Pritchett v. ICN Med. Alliance, Inc.*, 938 So.2d 933, 940-41 (Ala. 2006), *Southland Bank v. A&A Drywall Supply Co.*, 21 So.3d 1196, 1215 (Ala. 2008). A claim for negligent *retention* would necessarily require notice; the theory is that the principal negligently kept an employee despite notice of his incompetence or reckless nature. However, negligent *training,* including the failure to train at all, does not. Instead, it focusses on the principal's actions, or lack thereof, and the principal's duty to adequately prepare its employee to safely perform the task she was hired for. Because the principal controls the training, it is on notice of what it has and has not done.

Even if the Court agreed with SMH on this legal issue the argument still fails. Prior to trial, SMH refused to produce any information regarding prior incidents involving Nurse Elenwa or any of her evaluations. Instead, it objected by raising the quality assurance privilege (Ala. Code § 22-21-8) and the "other acts" language of the medical liability act (Ala. Code § 6-5-551), which the Alabama Supreme Court has held is a privilege. *Ex parte Geneva Health*, 8 So.3d 943, 946-47 (Ala. 2008). By doing so SMH

made it impossible for Mrs. West (or any plaintiff in a medical case) to meet a material element of negligent training, were this Court to agree with SMH on the law. This result is illogical. Pursuant to Rule 512A(a), Ala. R. Evid., this Court as the finder of fact in this post judgment proceeding can draw an adverse inference from SMH's claim of privilege. The Court does so now, and infers that had those materials been produced they would have contained information necessary to meet the element SMH complains of.

The Court also rejects SMH's argument that a nurse never has a duty to challenge a doctor's instructions, and in particular SMH's reliance on *Springhill Hospitals, Inc. v. Larimore*, 5 So.3d 513 (Ala. 2008). Substantial evidence was introduced to the contrary, including admissions and testimony by both Parties' retained nursing experts, and various evidence regarding the nursing standard of care. Pursuant to SMH's argument, hospital staff, including nursing staff, never have a duty to challenge the most obvious mistakes or egregious instructions.

In sum, there is substantial evidence that SMH breached its duty to exercise the degree of reasonable care, skill, and diligence ordinarily exercised by similarly situated health care providers in the same or similar circumstances, and that John Dewey West, Jr., was probably caused to die as a proximate consequence of the breaches by the Defendant of those applicable standards of care. As such, and for the other reasons set forth in Plaintiff's opposition briefs, SMH's renewed motion for judgment as a matter of law pursuant to Rule 50 is DENIED.

II. Motion for New Trial

Trial courts are authorized to grant new trials on the ground that an error of law occurred at the trial if the issue was properly preserved. *See*, Ala. R. Civ. P. 59 and Ala.

Code §12-13-13(a). *See also Cain v. Edward J. Woerner & Sons, Inc.*, 541 So. 2d 693, 694 (Ala. 1989). SMH argues twelve separate grounds for new trial, some of which involve pre-trial rulings and rulings made during trial, and some of which involve alleged errors on rulings never made to issues never raised[3]. The twelfth argument (Dr. Lewis Nelson's testimony regarding nursing) was only made recently in SMH's June 9 reply to Plaintiff's opposition to SMH's brief (doc. 1112).

The Court finds that SMH's new trial issues one through six (pulse oximetry monitoring in 2014, Dr. Kenneth Rothfield's testimony, missing Narcan doses, failure to report Mr. West's death to the Medical Examiner, Sentinel Event Alert 49, counsel's comment on absent witnesses) and issue twelve (Dr. Lewis Nelson's nursing testimony) are without merit. This Court's pre-trial rulings and its rulings made during trial were, in retrospect and considering the law, facts and arguments, correct. Further, SMH's briefs fail to show how each and every alleged error was timely and adequately raised with requisite specificity and was thereby preserved for review. Finally, SMH has failed to demonstrate how any one or more of these issues could be deemed to warrant the extraordinary relief of a new trial in the face of Alabama's harmless error rule. Ala. R. Civ. P. 61.

The Court finds that SMH's seventh reason for new trial (that the award of $35,000,000.00 requires remittitur) does have merit, and this issue is addressed in Part IV of this order discussing remittitur. To the extent that this seventh reason argues the

[3] SMH's March 24 motion, read most expansively, raises over one hundred separate grounds for new trial. Again, the Court will only address those that were actually briefed and argued.

award is constitutionally excessive, and must be reduced outside the remittitur process, it is DENIED.

Finally, as to issues eight through eleven (the Court incorrectly interpreted the wrongful death statute, a new trial under a "constitutionally permissible" wrongful death regime is required, punitive damages cannot be awarded for negligent conduct, and a heightened standard of proof requires a new trial), the Parties agree that it is not within this Court's power to declare statutes unconstitutional or to attempt to overturn long established precedent. These arguments are made for the appellate courts, and those courts can decide if they were waived or have any merit. This Court rejects them.

With regard to all of these issues, the Court is convinced the Parties received a fair and impartial trial. The jury was selected from a panel of fifty citizens of Mobile County and represented an accurate cross section of the County's demographics. No allegation is made of any impropriety regarding the jury's selection, nor is there any allegation of any individual juror's misconduct. The jury instructions were, for a case of this magnitude and complexity, fairly simple and no objection was made to the charge by either Party. Both Parties were represented by exceptional lawyers who zealously and skillfully advocated for their clients. The Parties, their counsel, and their respective support teams and staff were treated with respect and consideration throughout a very long and arduous trial. Though not relevant to these new trial issues, the Court notes that it extended several scheduling courtesies to SMH with its witnesses, that it overruled several of Plaintiff's objections, and that it sustained several of SMH's objections throughout the course of trial. The Court's rulings were evenhanded.

For these reasons SMH's arguments for new trial, with the exception of remittitur, are DENIED.

III. Statutory Reduction Pursuant to Ala. Code § 6-5-547

SMH asks the Court to reduce the amount of the jury's award to $1,000,000.00 pursuant to Ala. Code § 6-5-547. This issue is raised for the sole purpose of argument on appeal. Both Parties agree that § 6-5-547 was declared unconstitutional by the Alabama Supreme Court in *Smith v. Schulte*, 671 So.2d 1334 (Ala. 1994), and they also agree that this Court has no authority to presume to overturn a higher court's extremely clear and direct precedent. This basis for relief is DENIED.

IV. Remittitur

Finally, SMH argues the award is excessive and must be reduced to $2,000,000.00 or less. Plaintiff argues the award is justified and must remain undisturbed.

As noted earlier, the Court observed the demeanor, participation, attentiveness, and other attributes of the jurors during voir dire and trial. Defendant alleges no juror misconduct, and none was observed by the Court. Instead, the jury appeared to be attentive, patient, and interested. They were calm and deliberate, and treated the case with the solemnity and respect it deserved. It did not appear that the jury was partial to one side or the other, or that sympathy, bias, passion, prejudice, corruption, or any other improper motive influenced the jury in their deliberation or arriving at the verdict and award.

In reviewing a punitive damages award for excessiveness this Court considers several well recognized factors established by long standing precedent, and in particular those set forth in *BMW of North America Inc., v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed. 2d 809 (1996), *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989), and *Hammond v. Gadsden*, 493 So.2d 1374 (Ala. 1986). Most recently, in reviewing a medical liability wrongful death award for excessiveness the Alabama Supreme Court stated:

> 'In reviewing a punitive-damages award, we apply the factors set forth in Green Oil [Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989)], within the framework of the "guideposts" set forth in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed. 2d 809 (1996), and restated in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L.Ed. 2d 585 (2003). See AutoZone, Inc. v. Leonard, 812 So. 2d 1179, 1187 (Ala. 2001) (Green Oil factors remain valid after Gore).
>
> 'The Gore guideposts are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Campbell, 538 U.S. at 418, 123 S. Ct. 1513. The Green Oil factors, which are similar, and auxiliary in many respects, to the Gore guideposts, are:
>
> ' "(1) the reprehensibility of [the defendant's] conduct; (2) the relationship of the punitive-damages award to the harm that actually occurred, or is likely to occur, from [the defendant's] conduct; (3) [the defendant's] profit from [his] misconduct; (4) [the defendant's] financial position; (5) the cost to [the plaintiff] of the litigation; (6) whether [the defendant] has been subject to criminal sanctions for similar conduct; and (7) other civil actions [the defendant] has been involved in arising out of similar conduct."
>
> " 'Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003)(paraphrasing the Green Oil factors).'

"Ross v. Rosen-Rager, 67 So. 3d 29, 41-42 (Ala. 2010). ...

Bednarski v. Johnson, ___ So.3d___(Ala. 2021), 2021 WL 447248 at 15.

Because a jury's verdict is constitutionally protected, this Court may not interfere with it unless it is flawed as a matter of law. See *Hammond*, supra, at 1378 ("[a] jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection"). Assuming a properly functioning jury, a jury's verdict for punitive damages may be remitted only if the verdict punishes the defendant too severely for its misconduct. *BMW v. Gore*, supra; *Green Oil v. Hornsby*, supra, 539 So.2d at 221; *Industrial Chemical v. Chandler*, 547 So.2d 812, 837 (Ala. 1988)("'punitive damages... must not exceed an amount that will accomplish society's goals of punishment and deterrence'"). This Court's review of the award is made de novo. *Target Media Partners Op. Co. v. Specialty Mktg. Co.*, 177 So.3d 843 (Ala. 2013). The Defendant SMH bears the burden of proving excessiveness. *McDowell v. Key*, 557 So.2d 1243, 1249 (Ala. 1990). It is not sufficient for a defendant to merely allege excessiveness; it must prove the issue by submitting evidence that "will justify interference" with the jury's constitutionally protected verdict. *Fuller v. Preferred Risk Like Ins. Co.*, 577 So.2d 878, 886 (Ala. 1991).

1. BMW v. Gore guideposts

In *BMW v. Gore*, supra, the United States Supreme Court established three "guideposts" for the review of punitive damages awards: 1) the degree of reprehensibility of the defendant's conduct, 2) the ratio of punitive damages to the harm inflicted by the defendant, and 3) the size of the award in relation to civil and criminal penalties for similar misconduct. Within the analysis of reprehensibility the Court also considers the duration

of the conduct, the degree of the Defendant's awareness of any harm the conduct has caused or will cause, any concealment or coverup of the conduct, and the existence or frequency of any similar conduct in the past. *BMW v. Gore*, 701 So.2d 507, 512 (Ala. 1997)(on remand from the United States Supreme Court).

A. Reprehensibility

The United States Supreme Court has stated that reprehensibility is "the most important indicium of the reasonableness of a punitive damage award." *Gore* at 512 (citations omitted). In *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 the Supreme Court stated:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. .... The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Campbell at 419 (citations omitted).

With regard to reprehensibility the Court finds as follows:

i. The large overdose of Dilaudid. Virtually every expert testified Mr. West received an extremely high dose of Dilaudid (8 milligrams within one hour and fifty-one minutes). Dr. Kenneth Rothfield, Plaintiff's IV opioid hospital patient safety expert testified that it was "the most egregious overdose I've seen in the most unsafe setting I have ever seen of any case I've ever reviewed." Tr. 890-91. Dr. Lewis Nelson, a medical

toxicologist characterized the dose as "extremely high." Tr. 1384-1385. Dr. Jim Spires, a local physician and the former Chief of Medical Staff at SMH testified as an expert for Mrs. West without compensation. He testified that "he would never give a dose like that" and that it would be "five to six times the amount of medication [he has] ever given a patient." Tr. 1736-1737. Finally, and significantly, Nurse Jane Elenwa, despite all evidence to the contrary, denied administering the two doses to Mr. West, because, in this Court's opinion, she was well aware of how tremendous they were. Despite adamantly denying giving the doses, she described them as "egregious", a "gross violation" of the standard of care, "excessive", "ridiculous", "not appropriate", "unacceptable", and she went on to say the dosage amounts "[made] no sense", and that if given "we'd be coding the patient" which is exactly what happened. Unlike her testimony denying her involvement, this testimony was believable.

ii. The known risk of opioid induced respiratory depression

Substantial evidence was admitted at trial that the risk of opioid induced respiratory depression was well known in June 2014 and that SMH implemented no policies and procedures to address the issue. Specifically, SMH failed to implement an IV opioid administration policy, a monitoring policy, a respiratory assessment policy, a dosing guideline, a sedation assessment policy, and a policy on electronic monitoring. SMH had no training in place for its nurses on IV opioid safety, including how to identify patients at high risk for opioid induced respiratory depression, on how to administer high risk medication, and on dosing guidelines for IV opioids. Pursuant to Plaintiff's nursing expert Kim Arnold, the standard of care in June 2014 required the Chief Nursing Officer at SMH to implement all of these measures, and the failure to do so was a violation of that

standard of care. Plaintiff's expert Dr. Kenneth Rothfield stated he had "never seen a hospital without a medication safety program and awareness of the dangers of opioids until I became involved in this matter." Tr. 806. Various safety organizations, including the Joint Commission, recommend most or all of these measures. SMH admitted it did none of them.

III. Duration

The duration of the misconduct involving Mr. West was only about fourteen hours. He drove himself to SMH on the afternoon of June 4, 2014 and died early the next morning on June 5. However, the risks involved, and the failure to implement those policies listed above were well known for quite some time, including in 2012 when Sentinel Alert 49 was issued.

iv. Awareness of the hazard

SMH admitted at the time of Mr. West's death it had been aware of opioid induced respiratory depression for years, including the emphasis on creating a safety program and policies and procedures to address the issue, and that it did not create those programs and policies. SMH's employees testified that the failure to do so was "not acceptable", and agreed that in retrospect there should have been a policy for continuous pulse oximetry monitoring for high risk patients receiving IV opioids. Tr. 902-03; 938.

v. Concealment, cover up, deceit

SMH's direct employee, Nurse Elenwa, administered the two fatal Dilaudid doses. Despite overwhelming evidence to the contrary, Nurse Elenwa adamantly denied administering any Dilaudid to Mr. West and insisted the electronic medical records ("EMR") were incorrect and had been altered. However, based on the data entry

procedures for the EMR and the records from the medication cart this testimony was obviously false. SMH eventually stipulated that the medical records were accurate, including those portions of the records showing Nurse Elenwa administered the Dilaudid.

Evidence was also admitted that Mr. West's estate was charged for five doses of Narcan, an opioid reversal agent. Despite being charged for these doses, there was no entry in Mr. West's chart of anyone ever administering them to him. The Narcan doses were a contested issue prior to trial. Because cause of death was contested, (SMH argued Mr. West died from a completely unrelated cardiac event), the Court allowed Plaintiff to introduce evidence that the Narcan doses were missing from Mr. West's crash cart after he died because it was relevant to Plaintiff's theory that he overdosed on Dilaudid. An opioid overdose is the only reason to administer Narcan; there is no other reason to give it. The Court found it more than coincidental that these opioid reversal agents were missing from Mr. West's crash cart after he died, that *he was actually billed for them*, that the alleged (and disputed) cause of death was an opioid overdose, and that there was no entry in his chart of ever receiving them.

vi. Recidivism, prior similar misconduct

SMH objected to the production of document and discovery into any prior similar acts by raising the "other acts" provision of the medical liability act (§ 6-5-551). Again, the Alabama Supreme Court has interpreted this language of medical liability act to be a privilege. *Ex parte Geneva Health, supra*. SMH also objected to the introduction of any evidence of similar acts known to Mrs. West's attorneys through their prior representation of any other plaintiffs in claims against SMH and moved to strike these evidentiary submissions. This motion was granted (doc 1143). This factor is neutral at best to SMH.

vii. Dr. John McAndrew

Throughout this litigation SMH has been the only defendant. As a mitigator to its own reprehensibility, SMH asks the Court to consider the conduct of Dr. John McAndrew, Mr. West's orthopedic surgeon. SMH argued at trial and argues now that Nurse Elenwa cannot be blamed for following his instructions. Dr. McAndrew was on call at the SMH emergency room on the afternoon of June 4, 2014, and he performed a twenty-minute surgery to repair and partially amputate the very tip of Mr. West's left thumb. After surgery he admitted Mr. West to the hospital out of concern for possible infection to the thumb. He prescribed IV antibiotics to treat any potential infection. For pain he prescribed Percocet, an opioid taken as a pill, and four milligrams of IV Dilaudid every three hours. The instructions were less than clear. Dr. McAndrew testified that his intention was for the Percocet to be given first, and then if needed, *up to* four milligrams of Dilaudid every three hours. There is no evidence the Percocet was ever given other than Nurse Elenwa's testimony, which again, is contrary to the EMR and medicine cart records. The EMR shows four milligrams of Dilaudid was given at approximately 10:00 the evening of June 4, and that one hour and fifty-one minutes later another four milligrams of Dilaudid was given.

In *Lance v. Ramanauskus*, 731 So.2d 1204 (Ala. 1999), the Alabama Supreme Court ordered the remittitur of a $13 million wrongful death award against the only defendant, of several, that did not settle and instead went to trial. The Court noted that the parents of the deceased child had already collected $10 million in settlement from the other defendants; "[w]e are not unmindful that if this remittitur is accepted by the parents, a total of $14 million will have been paid on connection with the child's death."

Lance at 1221. The Court also specifically noted that that the conduct of Lance, the only remaining defendant, "was not the *most* reprehensible … of those parties involved in this action." *Id*. at 1219 (emphasis original). SMH asks this Court to apply the same reasoning. However, this case is not comparable. Unlike the other parties in *Lance*, Dr. McAndrew was never sued by Plaintiff, nor was he ever made a party by SMH. There is no evidence a monetary demand was ever made against Dr. McAndrew or that he ever paid any settlement.[4] Other than his deposition, he presented no evidence, and he did not participate in trial or otherwise actively defend his alleged errors. Finally, even considering what is known about Dr. McAndrew's conduct, any blame he may have for writing an unclear order is far outweighed by SMH's conduct.

Conclusion as to Reprehensibility

In sum, the reprehensibility factor weighs for remittitur, but only due to the unusually large amount of the jury's award. Mr. West drove himself to the SMH emergency room after cutting the tip of his left thumb with a table saw, he successfully underwent a twenty-minute surgery and there was every indication he would recover. Instead, he unexpectedly died approximately fourteen hours after arrival. There is substantial evidence that Mr. West lost his life due to the failure to implement policies and procedures to prevent well known hazards, and that the failure to do so violated the standard of care. As in *Bednarski*, supra, this case arose in a healthcare setting, in which the patient was completely reliant on the provider to care for him. Instead, Mr. West was administered a massive overdose of IV Dilaudid, causing him to die of respiratory failure, in a hospital with insufficient safeguards and procedures, and by a nurse who did not

[4] It is this Court's express understanding that no person or entity has made any settlement with Plaintiff.

follow the physician's orders, who was not properly trained, and who very obviously lied under oath about giving the drug at all. This was not a mere accident. The level of reprehensibility is high.

B. Ratio of punitive damages to the harm inflicted

In *Lance v. Ramanauskus*, 731 So.2d 1204, 1218 (Ala. 1999), the Alabama Supreme Court stated that "[b]ecause Alabama law does not allow the recovery of compensatory damages in a wrongful-death case, this factor is not applicable." However, in *Boudreaux v. Pettaway*, 108 So.3d 486 (Ala. 2012), the Court stated:

> As *Tillis Trucking* makes clear, however, a punitive-damages award in a wrongful-death case may nonetheless be compared and evaluated, though perhaps not in a strictly mathematical sense, by means of a "proportional evaluation" of the awarded amount, the conduct of a defendant, and the resulting harm from that conduct. 748 So.2d at 890. Thus … the award of punitive damages in a wrongful death case is subject to a proportionality review…

Boudreaux at 499.

In this case the jury's verdict, because it is so extraordinarily large, is disproportionate to the loss of Mr. West's life. However, the circumstances in which he lost his life call for a large award. See the discussion below regarding other medical liability death awards, and non-medical liability death awards. This guidepost weighs in favor of remitter.

C. Size of the award in relation to civil and criminal penalties for similar misconduct

"Alabama law does not impose specific limits on the amount that may be recovered in wrongful death actions." *McKowan v. Bentley*, 773, So.2d 990, 999 (Ala. 1999). Despite this language, a review of the case law on remittitur of medical liability

wrongful death awards leads to the conclusion that the amount of this award is "out of line". See *Bednarski v. Johnson*, ___ So.3d ___ (Ala. 2021)(2021 WL 4472478)($6.5 million award, after pro tanto settlement of $1 million, and remittitur by trial court from $9 million jury verdict, affirmed); *Health Care Authority for Baptist Health v. Davis*, 158 So.3d 397 (Ala. 2013)($3.2 million affirmed); *Boudreaux v. Pettaway*, 108 So.3d 486 (Ala. 2012)($4 million award, after remittitur by trial court from $20 million jury verdict, affirmed); *Mobile Infirmary Ass'n v. Tyler*, 981 So.2d 1077 (Ala. 2007)($3 million award, after remitted by Supreme Court from $5.5 million jury verdict); *Boles v. Parris*, 952 So.2d 34 (Ala. 2006)($1.375 verdict affirmed); *McKowan v. Bentley*, 773 So.2d 990 (Ala. 1999)($2 million verdict affirmed); *Smith v. Schulte*, 671 So.2d 1334 (Ala. 1995)($2.5 million verdict affirmed); *Campbell v. Williams*, 638 So.2d 804 (Ala. 1994)($4 million verdict affirmed); and *Atkins v. Lee*, 603 So.2d 937 (Ala. 1992)($6.875 million verdict affirmed).

Non-medical liability wrongful death remittitur case law also supports the conclusion that the amount of the award is excessive. See *Lance v. Ramanauskus*, 731 So.2d 1204 (Ala. 1999)($13 million jury award reduced by Supreme Court to $4 million); *Mack Trucks v. Witherspoon*, 867 So.2d 307 (Ala. 2003)($50 million jury award remitted to $25 million by trial court, further remitted to $6 million by the Alabama Supreme Court); and *Burlington N. R.R. v. Whitt*, 575 So.2d 1011 (Ala. 1990)($5 million award affirmed).

Finally, Plaintiff argues the Court should consider the impact of inflation on these prior verdicts and awards and offered the testimony of Dr. Robert W. McLeod, an economist at the University of Alabama in support of this theory. The Court finds these

arguments persuasive, especially the general argument that the value of a prior award, whether entered in 1999 or another year prior to this date, must be adjusted to some degree if it is to compare with an award entered today.

2. Hammond/Green Oil Factors

In *Shiv-Ram, Inc. v. McCaleb*, 892 So.2d 299 (Ala. 2003), the Alabama Supreme Court reiterated the Hammond/Green Oil factors as 1) the reprehensibility of the defendant's conduct, 2) the relationship of the punitive damages award to the harm that occurred or was likely to occur from the defendant's conduct, 3) the defendant's profit from its wrongful conduct, 4) the defendant's financial position, 5) the cost to the Plaintiff of the litigation, 6) if the defendant has been subject to criminal sanctions for similar conduct, and 7) other civil actions against the defendant for similar wrongful conduct. Each factor is discussed below:

A. Reprehensibility

This factor is similar to the first *BMW v. Gore* guidepost discussed above, and the analysis is the same.

B. Relationship of the punitive award to the harm

This analysis is substantially similar to the second *Gore* guidepost, discussed above. The harm to be evaluated is the death of Mr. West.

C. Defendant's profit from its misconduct

There was no evidence of profit from SMH's misconduct in this case.

D. Defendant's financial position

SMH has waived the argument that it does not have the ability to pay the $35 million award, and as such this factor weighs against remittitur. The Court notes that in doing so SMH has potentially denied itself a significant argument in favor of remittitur. The purpose of a punitive damages award is to deter, but not financially "destroy" the wrongdoer. *Ex parte Vulcan Materials Co.*, 992 So.2d 1252, 1260 (Ala. 2008).

> "[O]ur cases have held that a defendant's failure to produce evidence of its net worth effectively negates the benefit to the defendant of the relationship factor. In other words, a defendant cannot argue as a basis for reducing the punitive-damages award that the award 'stings' too much, in the absence of evidence of the defendant's financial status."

Id. at 1261. By waiving this argument the Court is left with no alternative other than to assume SMH can pay the verdict without being financially devastated.

E. Cost of litigation

This factor requires the Court to "determine whether the punitive-damages award is adequate to reward [plaintiff's] counsel for assuming the risk of bringing the action and to encourage other potential plaintiffs to bring wrongdoers to trial." *Shiv-Ram, Inc.* at 319 (citing *Green Oil* at 223). This guidepost is especially important in a wrongful death action wherein plaintiff's counsel is almost always engaged under a contingency fee contract and fronts all litigation expenses. "When an attorney accepts a client on a contingent-fee basis, the attorney assumes the risk of nonpayment for expenses and is acting at his own peril." *Madison County v. T.S.*, 53 So.3d 38, 56 (Ala. 2009).

Mrs. West submitted the affidavit of her attorneys' bookkeeper showing total expenses to date of $323,438.95. This amount is extremely high, and outweighs any amount incurred in a medical liability case to the undersigned's knowledge. It is well accepted within the legal community that it is very difficult to prevail as a plaintiff in a

medical liability case. They are notoriously expensive to pursue and, to the undersigned's personal knowledge, they are zealously defended, almost exclusively by seasoned and capable trial counsel. In this case both sides vigorously and skillfully represented their clients over six years of litigation. Trial lasted eleven days. Over twenty expert witness were retained by the Parties. Both sides employed multiple attorneys and innumerable support staff.

The Alabama Supreme Court has agreed that "[a] fair and reasonable inference is that medical negligence wrongful death verdicts must be left relatively sizeable if competent and qualified attorneys are to remain motivated" to continue to take them. *Boudreaux*, 108 So.3d at 503. Because of the sums spent, the time invested, the high stakes risk involved, and the need to encourage others to bring similar suits, this guidepost weighs against remittitur.

F. If the Defendant has been subject to criminal sanctions or other civil suits for similar conduct

Again, SMH has invoked the "other acts" privilege to prevent any discovery or evidence of any prior similar conduct. This factor is neutral.

G. Summary of remittitur factors

When all of the remittitur factors are weighed and considered it is clear that the amount of the jury's award must be reduced, but also that the final amount must remain comparatively large. Based upon all of these factors the Court is convinced that a remittitur from $35,000,000.00 to $10,000,000.00 is appropriate.

CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that with the exception of its motion to remit the verdict, all relief sought in Defendant's post trial motion and related briefs is DENIED. Defendant's motion for remittitur is GRANTED. The Court will require remittitur of the $35,000,000.00 punitive damage verdict to $10,000,000.00 as a condition to overruling for the Motion for New Trial. Plaintiff must file her acceptance of the remittitur by 12:00 noon, July 6, 2022 or the Court will grant new trial.

DONE this 27th day of June 2022.

S. WESLEY PIPES
CIRCUIT JUDGE

EXHIBIT C

Alabama Constitution of 1901

Article I, § 1

Equality and rights of men.

That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

Article I, § 6

Rights of persons in criminal prosecutions generally; self-incrimination; due process of law; right to speedy, public trial; change of venue.

That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement.

Article I, § 11

Right to trial by jury.

That the right of trial by jury shall remain inviolate.

Article I, § 22

Ex post facto laws; impairment of obligations of contracts; irrevocable or exclusive grants of special privileges or immunities.

That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.

Ala. Code 1975

Section 6-5-544

Recovery of noneconomic losses; limitation of such losses; mistrial if jury advised of limitation.

(a) In any action for injury whether in contract or in tort against a health care provider based on a breach of the standard of care, the injured plaintiff and spouse upon proper proof may be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, and other nonpecuniary damage.

(b) In no action shall the amount of recovery for noneconomic losses, including punitive damages, either to the injured plaintiff, the plaintiff's spouse, or other lawful dependents or any of them together exceed the sum of $400,000. Plaintiff shall not seek recovery in any amount greater than the amounts described herein for noneconomic losses. During the trial of any action neither the court nor any party shall advise or infer to the jury that it may not return an award for noneconomic losses in excess of an amount specified herein; in the event the jury is so advised or such inference is made, the trial court, upon motion of an opposing party, shall immediately declare a mistrial. Any verdict returned which includes an award for noneconomic losses in an amount greater than that permitted herein shall be reduced by the trial court to an amount which will include an award of noneconomic losses no greater than that permitted herein or to such lesser sums as the trial court deems appropriate in accordance with prevailing standards for reducing excessive verdicts.

Section 6-5-547

One million dollar limit on judgments; mistrial if jury advised of limitation.

In any action commenced pursuant to Section 6-5-391 or Section 6-5-410, against a health care provider whether in contract or in tort based on a breach of the standard of care the amount of any judgment entered in

favor of the plaintiff shall not exceed the sum of $1,000,000. Any verdict returned in any such action which exceeds $1,000,000 shall be reduced to $1,000,000 by the trial court or such lesser sum as the trial court deems appropriate in accordance with prevailing standards for reducing excessive verdicts. During the trial of any action brought pursuant to Section 6-5-391 or 6-5-410 neither the court nor any party shall advise or infer to the jury that it may not return a verdict in excess of $1,000,000; in the event the jury is so advised or such inference is made the court, upon motion of an opposing party, shall immediately declare a mistrial. The maximum amount payable under this section, $1,000,000, shall be adjusted on April fifteenth of each year to reflect any increase or decrease during the preceding calendar year in the Consumer Price Index of the United States Department of Commerce. Said adjustment shall equal the percentage change in the Consumer Price Index during the preceding calendar year.

Section 6-5-548

Burden of proof; reasonable care as similarly situated health care provider; no evidence admitted of medical liability insurance.

(a) In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.

(b) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself or herself out as a specialist, a "similarly situated health care provider" is one who meets all of the following qualifications:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state.

(2) Is trained and experienced in the same discipline or school of practice.

(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

(c) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, and holds himself or herself out as a specialist, a "similarly situated health care provider" is one who meets all of the following requirements:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state.

(2) Is trained and experienced in the same specialty.

(3) Is certified by an appropriate American board in the same specialty.

(4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

(d) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, no evidence shall be admitted or received, whether of a substantive nature or for impeachment purposes, concerning the medical liability insurance, or medical insurance carrier, or any interest in an insurer that insures medical or other professional liability, of any witness presenting testimony as a "similarly situated health care provider" under the provisions of this section or of any defendant. The limits of liability insurance coverage available to a health care provider shall not be discoverable in any action for injury or damages or wrongful death, whether in contract or tort, against a health care provider for an alleged breach of the standard of care.

(e) The purpose of this section is to establish a relative standard of care for health care providers. A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he or she is a "similarly situated health care provider" as defined above. It is the intent of the Legislature that in the event the defendant health care provider is certified by an appropriate American board or in a particular specialty and is practicing that specialty at the time of the alleged breach of the standard of care, a health care provider may testify as an expert witness with respect to an alleged breach of the standard of care in any action for injury, damages, or wrongful death against another health care provider only if he or she is certified by the same American board in the same specialty.

Section 6-5-551

Complaint to detail circumstances rendering provider liable; discovery.

In any action for injury, damages, or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, whether resulting from acts or omissions in providing health care, or the hiring, training, supervision, retention, or termination of care givers, the Alabama Medical Liability Act shall govern the parameters of discovery and all aspects of the action. The plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable to plaintiff and shall include when feasible and ascertainable the date, time, and place of the act or acts. The plaintiff shall amend his complaint timely upon ascertainment of new or different acts or omissions upon which his claim is based; provided, however, that any such amendment must be made at least 90 days before trial. Any complaint which fails to include such detailed specification and factual description of each act and omission shall be subject to dismissal for failure to state a claim upon which relief may be granted. Any party shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission.

Section 6-6-227

Persons to be made parties; rights of persons not parties.

All persons shall be made parties who have, or claim, any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance, or franchise, such municipality shall be made a party and shall be entitled to be heard; and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.

Section 6-11-21

Punitive damages not to exceed certain limits.

(a) Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater.

(b) Except as provided in subsections (d) and (j), in all civil actions where entitlement to punitive damages shall have been established under applicable law against a defendant who is a small business, no award of punitive damages shall exceed fifty thousand dollars ($50,000) or 10 percent of the business' net worth, whichever is greater.

(c) "Small business" for purposes of this section means a business having a net worth of two million dollars ($2,000,000) or less at the time of the occurrence made the basis of the suit.

(d) Except as provided in subsection (j), in all civil actions for physical injury wherein entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming

punitive damages or one million five hundred thousand dollars ($1,500,000), whichever is greater.

(e) Except as provided in Section 6-11-27, no defendant shall be liable for any punitive damages unless that defendant has been expressly found by the trier of fact to have engaged in conduct, as defined in Section 6-11-20, warranting punitive damages, and such defendant shall be liable only for punitive damages commensurate with that defendant's own conduct.

(f) As to all the fixed sums for punitive damage limitations set out herein in subsections (a), (b), and (d), those sums shall be adjusted as of January 1, 2003, and as of January 1 at three-year intervals thereafter, at an annual rate in accordance with the Consumer Price Index rate.

(g) The jury may neither be instructed nor informed as to the provisions of this section.

(h) This section shall not apply to class actions.

(i) Nothing herein shall be construed as creating a right to an award of punitive damages or to limit the duty of the court, or the appellate courts, to scrutinize all punitive damage awards, ensure that all punitive damage awards comply with applicable procedural, evidentiary, and constitutional requirements, and to order remittitur where appropriate.

(j) This section shall not apply to actions for wrongful death or for intentional infliction of physical injury.

(k) "Physical injury" for purposes of this section, means actual injury to the body of the claimant proximately caused by the act complained of and does not include physical symptoms of the mental anguish or emotional distress for which recovery is sought when such symptoms are caused by, rather than the cause of, the pain, distress, or other mental suffering.

(l) No portion of a punitive damage award shall be allocated to the state or any agency or department of the state.

Section 6-11-29

Wrongful death actions not affected.

This article shall not pertain to or affect any civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, as amended.

Section 12-2-7

Jurisdiction and powers of court generally.

The Supreme Court shall have authority:

(1) To exercise appellate jurisdiction coextensive with the state, under such restrictions and regulations as are prescribed by law; but, in deciding appeals, no weight shall be given the decision of the trial judge upon the facts where the evidence is not taken orally before the judge, but in such cases the Supreme Court shall weigh the evidence and give judgment as it deems just.

(2) To exercise original jurisdiction in the issue and determination of writs of quo warranto and mandamus in relation to matters in which no other court has jurisdiction.

(3) To issue writs of injunction, habeas corpus, and such other remedial and original writs as are necessary to give to it a general superintendence and control of courts of inferior jurisdiction.

(4) To make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, that such rules shall not abridge, enlarge, or modify the substantive right of any party nor affect the jurisdiction of circuit and district courts or venue of actions therein; and provided further, that the right of trial by jury as at common law and declared by Section 11 of the Constitution of Alabama of 1901 shall be preserved to the parties inviolate.

(5) To punish for contempts by the infliction of a fine not exceeding $100, and imprisonment not exceeding 10 days or both.

(6) To transfer to the Court of Civil Appeals, for determination by that court, any civil case appealed to the Supreme Court and within the appellate jurisdiction of the Supreme Court, except the following:

a. A case that the Supreme Court determines presents a substantial question of federal or state constitutional law.

b. A case that the Supreme Court determines involves a novel legal question, the resolution of which will have significant statewide impact.

c. A utility rate case appealed directly to the Supreme Court under the provisions of Section 37-1-140.

d. A bond validation proceeding appealed to the Supreme Court under the provisions of Section 6-6-754.

e. A bar disciplinary proceeding.

(7) To exercise such other powers as are or may be given to the Supreme Court by law.

Section 12-22-2

Final judgments of circuit or probate courts.

From any final judgment of the circuit court or probate court, an appeal lies to the appropriate appellate court as a matter of right by either party, or their personal representatives, within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure.

EXHIBIT D

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

PATRICIA BILBREY WEST, as Administratrix and Personal Representative of the Estate of JOHN DEWEY WEST, JR., Deceased,	§	CIVIL ACTION NO. CV-2016-901045
Plaintiff,	§	
v.	§	
Springhill Hospitals, Inc. d/b/a Springhill Memorial Hospital, et al.,	§	
Defendants.	§	

PLAINTIFF'S TRIAL EXHIBITS

NO.	EXHIBIT DESCRIPTION	TRANSCRIPT PAGE
PX7	The Joint Commission Sentinel Event Alert, Issue 49, 08/08/12, Safe Use of Opioids in Hospital	721 (marked), 2056 (admitted)
PX17	Code Sheet West v. SMH2807-2816	1253 (marked), 1614 (admitted)
PX19	Release of Body Consent West v. SMH00256-258	2055 (marked), 2056 (admitted)
PX20	PACU Assessments – Joann Edwards, RN West v. SMH232-236, 238 and 243	2055 (marked), 2056 (admitted)
PX21	Nursing Intra-Operative Record – Carrie Massengill, RN West v.SMH00239-242	2055 (marked), 2056 (admitted)

NO.	EXHIBIT DESCRIPTION	TRANSCRIPT PAGE
PX22	Springhill Medical Center Clinical Documentation Report - 06/04/2014 20:00:00 Maresha French entry of John West's vital signs West v. SMH 00244-00245	2055 (marked), 2056 (admitted)
PX24	Springhill Medical Center Audit Log for John West 06/04/14-05/20/16 – Maresha French, RN West v. SMH 02390-02397	2055 (marked), 2056 (admitted)
PX28	Detailed Audit Report - 06/05/14 03:50 by Maresha French West v. SMH 01040-01041	1253 (marked), 2056 (admitted)
PX33	Springhill Hospital Clinical Documentation Report - Orders for John West West v. SMH 00283	1253 (marked), 2055 (marked), 2056 (admitted)
PX33a	Springhill Hospital Clinical Documentation Report - Hydromorphone Order by Dr. McAndrew West v. SMH 00283	2055 (marked), 2056 (admitted)
PX34	Springhill Hospital Medication Administration Record for John West West v. SMH 00291-0293	976 (marked & admitted)
PX35	Springhill Hospital Omnicell Records for John West 06/01/2014-06/16/2014 West v. SMH 02398-02399	976 (marked & admitted)
PX36	Springhill Hospital Clinical Documentation Report – Complete Orders for John West West v. SMH 0271-0286	1253 (marked), 2056 (admitted)
PX37	Springhill Hospital John West Assessments 06/04/2014 20:52:00 by Jane Elenwa, RN West v. SMH 0245-0247	1529 (marked), 1614 (admitted)
PX38	Springhill Hospital Computer Screenshots (Nurse Elenwa's assessment) West v. SMH 02861-02907	1253 (marked), 2056 (admitted)

NO.	EXHIBIT DESCRIPTION	TRANSCRIPT PAGE
PX39	Springhill Hospital Clinical Documentation Report - Reassessment 06/05/2014 00:00:00 by Jane Elenwa, RN West v. SMH 0250	1253 (marked), 1614 (admitted)
PX40	Springhill Hospital Clinical Documentation Report - Plan of Care D 6/5/14 at 2:06:00 by Jane Elenwa, RN West v. SMH 0252	1253 (marked), 1614 (admitted)
PX41	Springhill Hospital Clinical Documentation Report - Nursing Assessment 06/05/2014 03:45:00 by Jane Elenwa, RN West v. SMH 0253	1253 (marked), 1614 (admitted)
PX43	Deposition Transcript Excerpt - Maresha French	1253 (marked)
PX44	Springhill Hospital Telephone Records 06/05/2014 PX44 Rm 1114 03:58am West v. SMH 02415	1253 (marked), 1614 (admitted)
PX45	Springhill Hospital Telephone Records 06/05/2014 Rm 1114 West v. SMH 02416-02417	1614 (marked), 1614 (admitted)
PX46	Springhill Hospital Clinical Documentation Report - 06/05/2014 07:27:00 Assessment by Jane Elenwa, RN West v. SMH 0259-0264	1253 (marked), 1614 admitted)
PX49	Springhill Hospital Staff Activity Report by Room West v. SMH 02401	1614 (marked & admitted)
PX51	Curriculum Vitae of Paul Read	976 (marked & admitted)
PX55	Springhill Memorial Hospital Policy - 09/22/2007 RE: Legal Health Record West v. SMH 02792-02793	976 (marked & admitted)
PX68	Omnicell XT Automated Dispensing Cabinets and Drawers Brochure (from Omnicell's website)	1123 (marked)
PX70	SMH Omnicell Transactions for Patient John West West v. SMH 02398-02399	2055 (marked), 2056 (admitted)

NO.	EXHIBIT DESCRIPTION	TRANSCRIPT PAGE
PX72	SMH Billing Records for 06/04/14 Admission West v. SMH 00314-00315	1614 (marked & admitted)
PX74	2012 Photograph of Patricia & John West	2055 (marked), 2056 (admitted)
PX79	Omnicell Report Abbreviation Key AJ-Omnicell Key-001-004	2055 (marked), 2056 (admitted)
PX85	XR 6/4/2014, 3:05:30 PM, AP View Left Hand	2055 (marked), 2056 (admitted)
PX86	XR 6/4/2014, 3:06:16 PM, Lateral View Left Hand	2055 (marked), 2056 (admitted)
PX87	XR 6/4/2014, 3:06:54 PM	2055 (marked), 2056 (admitted)
PX88	SMH Medical Record - Dr. Babcock's ER Note - ED Cardiac Arrest/Respiratory Arrest 06/05/14 05:22:00 West v. SMH 00179-00183	1614 (marked & admitted)
PX89	SMH Billing Records West v. SMH 00314-00315	1614 (marked & admitted)
PX90	Dr. McAndrew's 06/04/14 History & Physical West v. SMH 00192-00193	2055 (marked), 2056 (admitted)
PX94	Dr. McAndrew's Discharge Summary West v. SMH 00197	2055 (marked), 2056 (admitted)
PX96	Amended Death Certificate DC003-004	816 (marked & admitted)
PX97	CV – John McAndrew, III, MD	2055 (marked), 2056 (admitted)
PX101	Omnicell Report - List of Medications Pulled from Omnicell by Jane Elenwa 6/4/14-6/5/14 AJ-Omnicell-Elenwa-001-003	1123 (marked & admitted)

NO.	EXHIBIT DESCRIPTION	TRANSCRIPT PAGE
PX102	Omnicell Report Abbreviation Key AJ-Omnicell-Key-001-004	1123 (marked & admitted))
PX105	Fourth Notice of Video Deposition and Duces Tecum Pursuant to Rule 30(b)(6), A.R.C.P. of Defendant Springhill Memorial Hospital	1123 (marked)
PX108	Contract for Nurse Locator Badge signed by Jane Elenwa 7/17/14 West v. SMH 02483	2055 (marked), 2056 (admitted)
PX109	Detailed Staff Activity Report by Room/Location (Room #1114) West v. SMH 02400-02414	2055 (marked), 2056 (admitted)
PX112	8/5/13 Springhill Medical Center Nursing Orientation New Employee Pre-Orientation Survey - Jane Elenwa West v. SMH 02474-02482	976 (marked & admitted)
PX113	08/01/13 Springhill Memorial Hospital Core Orientation Checklist for RN - Jane Elenwa West v. SMH 02493-2501	976 (marked & admitted)
PX118	Plaintiff's Expert Disclosure - Richard Mitchell, MD	1912 (marked), 1966 (admitted)
PX119	Curriculum Vitae of Kenneth Rothfield, MD	709 (marked), 719 (admitted),
PX121	Curriculum Vitae of Kim Arnold, MBA, BSN, RN	984 (marked), 2056 (admitted)
PX134	Autopsy Report AUT001-008	816 (marked & admitted)
PX138	SMH Clinical Documentation Report: Does not qualify as a ME case West v. SMH 00257	2055 (marked), 2056 (admitted)
PX152	Medical Records for John West – Dr. Carter Bryars West v. SMH NPS – Carter, Bryars, MD 00001-00106	2055 (marked), 2056 (admitted)

NO.	EXHIBIT DESCRIPTION	TRANSCRIPT PAGE
PX153	Medical Records for John West – Dr. Patrick Nolan PN001-113	2055 (marked), 2056 (admitted)
PX154	Medical Records for John West – Premier Medical PM001-061	2055 (marked), 2056 (admitted)
PX156a	Medical Records for John West – Springhill Hospital West v. SMH 00001-00315	815 (marked & admitted)
PX169	SMH POLICY & PROCEDURE: Autopsy AJ-P&P-56-57	2055 (marked), 2056 (admitted)
PX176	SMH POLICY & PROCEDURE: Crash Cart: Contents and Checking AJ-P&P-001-014	1614 (marked & admitted)
PX185	SMH POLICY & PROCEDURE: Improve the Safety of Using Medications AJ-P&P-020-024	802 (marked), 2056 (admitted)
PX200	SMH POLICY & PROCEDURE: Nursing IV Orientation AJ-P&P-041-046	2596 (marked),
PX201	SMH POLICY & PROCEDURE: Nursing Standards of Care WEST V. SMH 02550-WEST V. SMH 02559	2821 (marked), 2822 (admitted)
PX207	SMH POLICY & PROCEDURE: Postmortem Procedures AJ-P&P-59-60	2055 (marked), 2056 (admitted)

NO.	EXHIBIT DESCRIPTION	TRANSCRIPT PAGE
PX244	Slide Photographs Taken by Richard Mitchell, MD A3-LAD 2x, A3-LAD 4x, A3-left atrium 2x, A3-left atrium 4x, A3-left ventricle 2x, A3-left ventricle 4x, A3-left ventricle 4x-1, A3-left ventricle 10x, A3-left ventricle 10x-1, A3-valve 2x, A3-valve 4x, A4-RCA 2x, A4-RCA 4x, A4-right atrium 2x, A4-right ventricle 2x, A4-right ventricle 4x, A4-right ventricle 10x, A4-right ventricle 10x-1, A4-valve 2x, A4-valve 4x, A5-diaphragm 2x, A5-diaphragm 4x, A5-diaphragm 4x-1, A5-interventricular septum 2x, A5-interventricular septum 2x-1, A5-interventricular septum 4x, A5-interventricular septum 10x, A5-interventricular septum 10x-1, A5-interventricular septum 20x, A5-interventricular septum 20x-1, A5-interventricular septum 40x, A5-LCX 2x, A5-LCX 4x, A5-right ventricle 4x	1966 (marked & admitted)
PX245	*Pulseless Electrical Activity as the Initial Cardiac Arrest Rhythm: Importance of Preexisting Left Ventricular Function*. Ambinder, Daniel, et al, J Am Heart Assoc. 2021;10:e018671.	754 (marked)
PX250	*How-to Guide: Prevent Harm from High-Alert Medications.* Cambridge, MA: Institute for Healthcare Improvement; 2012.	784 (marked)
PX251	*2005 2007 2012 2014 ISMP's List of High Alert Medications*. Institute for Safe Medication Practices.	729 (marked)
PX252	*High-Alert Medication Feature: Reducing Patient Harm from Opiates*. ISMP, February 22,2007, Volume 12 Issue 4	767 (marked)
PX260	*The Joint Commission* Accreditation Hospital. Comprehensive Accreditation Manual – Elements of Performance for EC.02.01.01. Effective January 2012.	999 (marked)
PX262	*The Joint Commission* Accreditation Hospital. Comprehensive Accreditation Manual – Medication Management. Effective January 2012.	1032 (marked)
PX274	*Pulse Oximetry in Adults.* Claudia Valdez-Lowe, MS, et al, AJN, June 2009, Vol. 109, No. 6	1507 (marked)
PX275	*Improving Outcomes in Med-Surg Patients with Opioid-Induces Respiratory Depression.* Frank J. Overdyk and Jesse J. Guerra, American Nurse Today, Volume 6, Number 11	1511 (marked)

NO.	EXHIBIT DESCRIPTION	TRANSCRIPT PAGE
PX277	*American Society for Pain Management Nursing Guidelines on Monitoring for Opioid-Induced Sedation and Respiratory Depression.* Donna Jarzyna, et al, Pain Management Nursing, Vol 12, No 3 (September), 2011	781 (marked)
PX278	*What Nurses Need to Know about Sleep.* Amy L. Morton, DNP, Nursing Made Incredibly Easy, May/June 2012.	1505 (marked)
PX279	*Turning the Tide on Respiratory Depression.* Yvonne D'Arcy, MS, Nursing 2013, September	1514 (marked)
PX280	*The Perianesthesia Nurse's Role in the Prevention of Opioid-Related Sentinel Events,* Chris Pasero, MS, Journal of PeriAnesthesia Nursing, Vol 28 No 1 (February)	1515 (marked)
PX284	*Monitoring Sedation.* Chris Pasero and Margo McCaffery, AJN, February 2002, Vol. 102, No. 2	1520 (marked)
PX285	*Comparison of Selected Sedation Scales for Reporting Opioid-Induced Sedation Assessment.* Allison Theresa Nisbet and Florence Mooney-Cotter, Pain Management Nursing, Vol 10, No 3 (September), 2009	1521 (marked)
PX286	*Assessment of Sedation During Opioid Administration for Pain Management.* Chris Pasero, Journal of PeriAnesthesia Nursing, Vol 24, No 3 (June), 2009.	1522 (marked)
PX290	*Postoperative Day One: A High Risk Period for Respiratory Events.* Shiv Taylor, et al, The American Journal of Surgery 190 (2005)	756 (marked)
PX291	*Dangers of Postoperative Opioids.* The Official Journal of the Anesthesia Patient Safety Foundation, Volume 21, No. 4, Winter 2006-2007	769 (marked)
PX297	*No Patient Shall Be Harmed by Opioid-Induced Respiratory Depression.* The Official Journal of the Anesthesia Patient Safety Foundation, Volume 26, No. 2, 21-140, Fall 2011	770 (marked)
PX318	*Timing of Oversedation Events Following Opiate Administration in Hospitalized Patients.* John S. Garrett, et al, J Clin. Med. Res. 2021;13(5):304-308	738 (marked)
PX327	FDA Labeling – Dilaudid Injection, 2011	763 (marked), 2056 (admitted)

NO.	EXHIBIT DESCRIPTION	TRANSCRIPT PAGE
PX381	Release of Body Consents & Permission for Autopsy pgs. 1-13	2055 (marked), 2056 (admitted)
PX382	Curriculum Vitae of Barbara J. Levin, RN	1472 (marked), 1614 (admitted)
PX384	Curriculum Vitae of Lewis S. Nelson, MD	1325 (marked), 1614 (admitted)
PX386	Curriculum Vitae of James Spires, MD	1725 (marked), 2056 (admitted)
PX388	Letters Testamentary	2055 (marked), 2056 (admitted)

EXHIBIT E

43 Am. J. Trial Advoc. 361

American Journal of Trial Advocacy
Spring, 2020

Article
Richard Riley[d1]

*361 THE EFFECT OF INFLATION ON ALABAMA WRONGFUL DEATH VERDICTS

Introduction

The reasonableness and constitutionality of a punitive damage award in a general tort case is judged primarily by the amount of compensatory damages recovered. Although consideration of other factors may result in variability in the amount of punitive damages ultimately allowed, the outer limit of punitive damages is gauged by a multiplier of the amount of compensatory damages recovered. This multiplier tether keeps the amount of punitive damages proportional, foreseeable, and fair. It also stands the test of time and continues to punish and deter tortfeasors and others from engaging in wrongful conduct *irrespective* of market fluctuations and the effects of inflation. The tether continues to be effective because, when the core components of compensatory damage (for example, medical costs, wages, property values, and others) increase over time, due to inflation or other market factors, the multiplier tether will naturally extend to allow for a proportional increase in punishment. As such, future tortfeasors will continue to be sufficiently punished and deterred.

Unlike other tort cases, however, cases brought under the Alabama Wrongful Death Act[1] have no compensatory damages component. Instead, only punitive damages may be recovered. As such, the tether must be, and is, different. Although other factors can give variability, the outer limit of wrongful death damages is tethered to the amount of damages approved by the Alabama Supreme Court in previous wrongful death cases. This makes sense in Alabama where every human life is precious and of equal worth. “The very purpose of punitive damages, then, in a wrongful death [case] rests upon the Divine concept that all human life is precious.”[2] A life is a life is a life. Because wrongful death ***362** damages are strictly punitive and tethered to damages previously approved by the Supreme Court of Alabama in previous wrongful death cases, the need to ensure sufficient future punishment and deterrence for wrongfully causing a death is particularly important. The Alabama Supreme Court has long held that “*no arbitrary cap* can be placed on the value of human life.”[3] However, the wrongful death comparison tether can *only* stand the test of time and continue to punish and deter future tortfeasors if the effects of inflation on previously approved awards are considered in the analysis. Otherwise, over time, this tether will remain permanently and rigidly taut and fixed in an ancient place, unfairly restricting the amount of future damages for causing a death as market factors and inflation continue to move on. Consequently, the economic worth of a life over time will cheapen and diminish, making it more economically palatable for tortfeasors to engage in dangerous behavior as the punishment for taking a life will continue to decrease. Not only is this scenario inconsistent with the Alabama Supreme Court’s long-standing pro-life interpretation of the Wrongful Death Act, it is also inconsistent with fundamental fairness and common sense, which have been the hallmarks of the supreme court’s punitive damage review procedures for decades.

As such, when considering motions for remittitur in wrongful death cases, Alabama courts should consider the effects of inflation on the previously approved supreme court awards serving as comparators for the subject award. This is the only way

to ensure that an arbitrary cap is never placed on the value of human life, and that the value of human life will always have no measure in Alabama.

I. The Pro-Life Intent, Interpretation, and Application of the Alabama Wrongful Death Act

The Alabama Wrongful Death Act (1) allows the recovery of punitive damages, and not compensatory damages, in wrongful death ***363** cases;[4] (2) allows recovery on proof of negligence, instead of proof of wantonness or intentional misconduct;[5] (3) only requires proof by a preponderance of the evidence, not by clear and convincing evidence;[6] and (4) prohibits the apportionment of the award amongst joint tortfeasors.[7] The Alabama Supreme Court has "made it clear" that the legal and moral justifications for these rules is that the Wrongful Death Act is "intended to protect human life, to prevent homicide, and to impose civil punishment on takers of human life."[8] "[T]he determination of damages [is decided] by reference to the quality of the tortious act," and the primary purpose in awarding damages for causing a death "is to punish the defendant and to deter others from like conduct."[9] The amount of punitive damages is determined by considering "[(1)] the culpability of the defendant[, (2)] ... the enormity of the wrong, and ... [(3) the need] for the preservation of human life."[10]

> [C]onsideration of the "enormity of the wrong" includes assessing the finality of death, the propriety of punishing the wrongdoer or wrongdoers, whether the death could have been prevented, and, if so, the lack of difficulty that would have been involved in preventing the death, as well as the public's interest in deterring others from committing ... similar wrongful conduct.[11]

The Alabama Supreme Court's interpretation of the Wrongful Death Act is morally and ethically right. It is also a strong deterrent. After all, a compensatory-based remedy would only deter defendants from harming ***364** the lives of the healthy, the wealthy, and those earning the highest wages. It would be less likely to deter defendants from harming the young; the weak; those disabled from work; those who after decades have earned the right to stop working; and those who care for their children, parents, and others for no wage. In short, Alabama's Wrongful Death Act is one of the "great levelers."[12] It reflects the Alabama Legislature's conviction that "the value of the life of the community's most prominent citizen is no greater than the value of the life of its most desolate or despicable citizen."[13] As stated by one jurist, who found himself interpreting Alabama law from afar:

> Those [harmed] may be the ill, the elderly, the disabled, the vulnerable. Under [a] traditional measure of compensatory damages, these also may be the same people whose lives may be considered "less valuable." To say that the defendants' conduct should be any less punishable because it caused harm to someone more vulnerable seems illogical and goes against the goals of punitive damage awards [in Alabama].[14]

Stated more bluntly by the Alabama Supreme Court, "'[i]t would be bizarre, indeed, to hold that the greater the harm inflicted the better the opportunity for exoneration of the defendant,' especially given the focus in the Wrongful Death Act on punishing the wrongdoer by allowing punitive damages."[15]

In 1988,[16] 1991,[17] 1999,[18] 2012,[19] and at numerous times in between,[20] the Alabama Supreme Court has consistently rejected the notion ***365** that its interpretation of the Wrongful Death Act is unconstitutional or wrong. In 2016, the court rejected a construction that "would prohibit wrongful-death actions arising from a tortfeasor's simple negligence" because "[s]uch a result would unduly limit the reach of the Wrongful Death Act and undermine its purpose to prevent homicide."[21] The court has also held that wrongfully causing a death, even only by mere negligence, is itself reprehensible and deserving of stout punitive damages:

> This [reprehensibility] guidepost is also treated differently in the wrongfuldeath context because of the unique circumstance that, in such a case, the jury is authorized to award punitive damages on a negligence claim. Consequently, this Court has listed certain factors that may be considered in evaluating "reprehensibility" even though no wantonness is present.[22]

The United States Supreme Court has agreed with the Alabama Supreme Court's interpretation. Long ago in *Pizitz Dry Goods v. Yeldell*,[23] an Alabama business claimed it was unfair to be held vicariously liable for punitive damages caused solely by the wrongful conduct of an employee, and not the hierarchy in the corporation.[24] The court held:

> We cannot say that it is beyond the power of a Legislature ... to attempt to preserve human life by making homicide expensive. It may impose an ***366** extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented.[25]

Moreover, the modern Alabama Supreme Court continues to quote *Yeldell* for the proposition that "[e]ven if we were to assume that [one defendant's] share of the judgment against them is disproportionate to their fault ... the judgment does not violate due process under long-standing precedent."[26] It has reasoned that this well-established principle "is also consistent with the criminal-law principle that all parties to the same criminal offense are subject to the same range of punishment, regardless of their individual degree of culpability" and that "[a]n accomplice may therefore be punished as severely, or even more severely, than a more culpable offender."[27]

Defendants often argue that these pro-life aspects of an Alabama wrongful death claim are entirely judge-made and have been unfairly foisted on the legislative branch by the judiciary. However, for 150 years the Alabama State Legislature has *never* changed *any* of these interpretations--even during the significant tort reform efforts of the late 1980s, the late 1990s, and early 2010s. Instead, in 1987, the legislature *embraced* all of these pro-life interpretations by carving wrongful death cases out of the statutory limitations it imposed on punitive damages in other tort cases.[28] The Alabama Legislature did so again in 1999 when it exempted wrongful death claims from the punitive damage caps that it created for other tort cases.[29] Most recently, the legislature amended the Wrongful Death Act in 2011 to create a special venue rule. Again, it did not change any of the Alabama Supreme Court's interpretation.[30] This is important. "The Legislature, when it enacts legislation, is presumed to have knowledge of existing law and of the judicial construction of existing statutes,"[31] and "when the Legislature reenacts or amends ***367** [an act] without altering language that has been judicially interpreted, it adopts a particular judicial construction."[32] Therefore, it is not just the Alabama Supreme Court's interpretation of the Wrongful Death Act that protects Alabama citizens and our guests--these pro-life principles have been blessed and approved by the Alabama Legislature as well.

II. The Framework for Considering Motions for Remittitur of Punitive Damage Awards

For over four decades, the Alabama Supreme Court has worked to make Alabama's punitive damage jurisprudence fair and balanced, both in general tort cases and in wrongful death cases. Sufficient checks and balances now exist that make the process fair for plaintiffs and defendants, while still preserving the important public policy objectives that the legislature wants punitive damages and the Wrongful Death Act to serve. The relevant guideposts are set forth in Alabama Code § 6-11-23, *BMW v. Gore*,[33] *Green Oil Co. v. Hornsby*,[34] and their progeny.[35]

The *BMW* guideposts are:

> (1) the degree of reprehensibility of the defendant's misconduct,
>
> (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award, and
>
> (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases.[36]

The *Green Oil* guideposts, which the Alabama Supreme Court has held "are similar, and auxiliary in many respects,"[37] are:

(1) the reprehensibility of the defendant's conduct;

***368** (2) the relationship of the punitive damage award to the harm that actually occurred, or is likely to occur, from the defendant's conduct;

(3) the defendant's profit from its misconduct;

(4) the defendant's financial position;

(5) the cost to the plaintiff of the litigation;

(6) whether the defendant has been subject to criminal sanctions for similar conduct; and

(7) other civil actions against the defendant involving similar conduct.[38]

Finally, the guideposts from Alabama Code § 6-11-23(b) are:

> [(1)] the economic impact of the verdict on the defendant or the plaintiff, [(2)] the amount of compensatory damages awarded, [(3)] whether or not the defendant has been guilty of the same or similar acts in the past, [(4)] the nature and the extent of any effort the defendant made to remedy the wrong and [(5)] the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong ....[39]

The second factor in each of these three lists of guideposts all require a reviewing court to consider the amount of compensatory damages, and the relationship between the harm and the punitive damage award. Incredibly, many defendants argue that because no compensatory damages are awarded in a wrongful death case that there allegedly can be no comparison, and that every wrongful death award should be vacated, reduced to zero, or reduced to a nominal amount. These notions are plainly wrong. Under the law, nominal damages are "a *trifling* sum awarded when a legal injury is suffered but when there is no substantial loss."[40] Is the death of a person an "insubstantial" loss? Is a human life worth a "trifling sum"? The answer to both questions is "No."[41]

***369 III. How the Comparison Guideposts Are Used in Wrongful Death Cases**

The Alabama Supreme Court has long held that "the value of human life has no measure."[42] Moreover, the reprehensibility guideposts have been interpreted to "consider whether the harm caused was physical as opposed to economic," with the former warranting a greater award.[43] However, a nominal damages approach would turn this guidepost on its head because a lesser injury would allow for more punitive damages than a death and revert the law to the "intolerable situation" where "it was cheaper for the defendant to kill the plaintiff than to injure him."[44]

To reconcile the comparison guideposts with the mission of the Wrongful Death Act, for decades the Alabama Supreme Court has held that even though no compensatory damages are recoverable on a wrongful death claim, a punitive damage

award in a wrongful death case may still be compared and evaluated "by means of a 'proportional evaluation' of the awarded amount, the conduct of a defendant, ... the resulting harm from that conduct"[45] and by "consider [ing] how the award ... compares with awards affirmed in other wrongful death cases [the Alabama Supreme Court] has reviewed."[46] Furthermore, because ***370** wrongful death damages constitute a civil penalty, this procedure complies with the third *BMW* guidepost because the reviewing court is, in essence, analyzing the "difference between [the punitive damages awarded by the jury] and the civil penalties authorized or imposed in comparable cases."[47]

Five important points should be considered when applying the Alabama Supreme Court's wrongful death comparison rule.

First, only awards affirmed in other wrongful death cases reviewed by the Alabama Supreme Court qualify as valid comparators.[48] Awards that are merely rendered by circuit courts, but never reviewed on appeal, do not count. Some defendants will try to use jury verdicts that never reached the Alabama Supreme Court because they were paid or settled. Or they may try to use verdicts that were never reviewed by the supreme court because the judgment was reversed by the circuit court or the supreme court on a motion for new trial or renewed motion for judgment as a matter of law. By the plain terms of the supreme court's rule, however, these verdicts should not be considered.

Second, defendants will also argue that the previously approved award has to be included in the Southern Reporter to count. However, the supreme court has held that comparisons may be made to "cases this Court *has reviewed*."[49] It has not required that the cases be *reported*. I have found no authority for the proposition that the previously upheld award has to be in a reported opinion. We all know that the supreme court reviews substantially more judgments than are reported. Therefore, you should use affirmed no-opinion awards, such as the one in *Nineteenth Street Investments Inc. v. Robertson*,[50] where in 2015 the Alabama Supreme Court upheld a $7 million wrongful death punitive damage award (along with another $6 million in punitive damages for two injuries) without ordering any remittitur for a single incident.[51] Notably, ***371** the United States Supreme Court declined to review this case for excessiveness.[52]

Third, defendants will try to limit the comparable cases to those presenting the exact factual scenario at hand. Of course, this tactic would reduce the comparable cases down to the vanishing point. No case is factually identical. A review of the Alabama Supreme Court's opinions reveals that the court has sometimes compared the facts of prior approved awards or judgments that are relevant to the guideposts, but it has never required exactitude in the factual details of the cases. It does not matter that the award being reviewed is a trucking case and the previously approved award was a malpractice case. What matters is whether the degree of reprehensibility in the two cases is similar, whether the financial condition of the defendants in the two cases is similar, whether the decedent was in a similarly vulnerable position, and so on.

IV. Inflation Must Be Considered When Verdicts Are Compared to Prior Affirmed Awards

And now we get to the heart of this Article. The fourth point is that it is only fair and right for the reviewing court to consider the effect of inflation on previously affirmed wrongful death awards. As stated by President Reagan back in 1978, "[i]nflation is as violent as a mugger, as frightening as an armed robber, and as deadly as a hit man."[53] Since the 1950s, the Alabama Supreme Court has not only recognized that future inflation will diminish the value of the invested lump-sum compensatory damage award, it has recognized that "the decreasing value of the dollar" is a factor that a reviewing court can consider on a motion for remittitur of a compensatory award to determine whether such "jury verdicts are excessive."[54] In fact, the effects of inflation are so grounded in reality that the supreme court stated back in 1969 that juries did not need to be charged on this economic principle, stating aptly that "it is hardly ***372** necessary to remind a jury of the diminished purchasing power of the dollar, as the jurors are reminded of it almost daily."[55]

Although the supreme court has not yet squarely considered the question of inflation on previous wrongful death awards, it has recognized that Alabama "has interests in ensuring ... that a punishment assessed against a civil defendant is not diluted by inflation and the passage of time."[56] Moreover, the court has not only held that "no arbitrary cap can be placed on the value of human life,"[57] it has also held that the amounts reflected in its prior affirmed awards are *not a ceiling*. Instead, the test is whether the award being reviewed "is not an *unusually large* amount in comparison with awards affirmed in other wrongful-death cases."[58] In other words, the amount of the award being reviewed can be higher than a prior approved award, as long as it is not "unusually larger" by comparison. Basic principles of economics teach that any present-day award that is within the inflation-adjusted amounts of prior approved awards is not "unusually large" by comparison. To the contrary, inflation is not only usual, it is predictable and certain.

And of course, if inflation is not considered, wrongful death awards a hundred years from now would be judicially capped by awards from the 1980s. This would not "protect[] ... the lives of [future] citizens."[59] Instead, it would only encourage future tortfeasors because the punishment for causing a death, and the monetary value of each human life, would greatly lessen over time.[60]

The following table, created with a calculator for determining inflation at the Consumer Price Index (CPI) rate, shows that a $10 million to $15 million award would not be considered "unusually large" today.[61]

	THEN	**TODAY**[62]
Black Belt v. Sessions, 514 So. 2d 1249 (Ala. 1986)	$3.5 million	$8.2 million
Burlington Northern Railroad Co. v. Whitt, 575 So. 2d 1011 (Ala. 1990)	$5 million	$9.8 million
General Motors Co. v. Johnston, 592 So. 2d 1054 (Ala. 1992)	$7.5 million	$14.1 million
Atkins v. Lee, 603 So. 2d 937 (Ala. 1992)	$6.9 million	$12.7 million
Sears Roebuck v. Harris, 630 So. 2d 1018 (Ala. 1993)	$4 million	$7.1 million
Campbell v. Williams, 638 So. 2d 804 (Ala. 1994)	$4 million	$7.1 million
Mack Trucks v. Witherspoon, 867 So. 2d 307 (Ala. 2003)	$6 million	$8.5 million

***373** Furthermore, the top end of the range might be higher than $14 million. Although the Alabama Supreme Court technically reduced a $13 million award to $4 million in *Lance, Inc. v. Ramanauskas*,[63] a close examination of that case shows the court really upheld a $14 million recovery because there were $10 million in pro tanto settlements with joint tortfeasors.[64] The *Lance* court stated that "we must expect results such as the one in this case" (that is, a $14 million recovery) because "[h]ad there been no settlements and the three defendants suffered a judgment at a joint trial, their liability would have been joint and several, and the excessiveness of the verdict would have been measured by the enormity of the collective wrongdoing."[65] Therefore, in reality, it was recognized twenty years ago in *Lance* that a $14 million recovery is permissible in cases where "the enormity of the collective wrongdoing" is extraordinary.[66] When adjusted ***374** for inflation, the amount recovered in *Lance* would authorize a $21.5 million award today.[67]

Alabama courts should consider inflation not only because it is consistent with basic economics principles, but because it is consistent with the intent of the Alabama Legislature. Specifically, in 1999 the legislature declared in Alabama Code § 6-11-21(f) that the punitive damage caps applicable to awards rendered in general tort cases "shall be adjusted" every three years "in accordance with the Consumer Price Index rate."[68]

Wrongful death actions were excluded from these caps,[69] but the legislature only did this to *protect* the pro-life interpretation of the Wrongful Death Act from the *burdens* of the punitive damage legislation, not to create unique hurdles to recover punitive damages in wrongful death cases.[70] Indeed, the Alabama Supreme Court has held that wrongful death awards should be reviewed like other punitive damage awards.[71] Moreover, the 2000 amendments to the 1999 caps not only exempted wrongful death awards from statutory caps,[72] they also expressly stated that the 2000 amendments must "ensure that all punitive damage awards comply with applicable procedural, evidentiary, and constitutional requirements."[73] This statement of legislative policy shuts the door on any argument the legislature did not want inflation to be considered on the remittitur

guideposts in wrongful death cases.

***375** Such an argument would also be contrary to common sense. There is no reason why a severely injured plaintiff should be entitled an inflation adjustment, but a wrongful death beneficiary should not. "If a literal construction would produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute, such a construction is to be avoided."[74] Stated differently,

> [t]he inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not unfrequently met with, often require the court to look less at the letter or words of the statute, than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law giver.[75]

When the entire context is considered, it is clear that the will of the Alabama Legislature is for wrongful death beneficiaries to enjoy any and all benefits that are given to plaintiffs generally in the punitive damage acts set forth in the Alabama Code. Any other holding "would produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the [Wrongful Death Act and the punitive damage statutes]."[76]

Even if § 6-11-21(f) does not expressly authorize consideration of inflation when comparing wrongful death verdicts to prior approved awards, the Alabama Legislature's clear stance on this matter is a valid basis for the supreme court to adjust its comparison rule to accommodate it. "It is the crowning merit of the common law ... that it is not composed of ironclad rules, but may be modified to a reasonable extent to meet new questions as they arise."[77] For example, in *Atkins v. American Motors Corp.*,[78] the Alabama Supreme Court drew from the legislature's ***376** substantial changes to the UCC claim for the breach of the implied warranty of merchantability to augment the rights of injured consumers to create the Alabama Extended Manufacturers' Liability Doctrine (AEMLD)[79] and advance an Alabama plaintiff's tort remedy in product liability cases.[80]

> Whether the legislature has adopted strict liability by statute is not presented. We do, however, find some guidance in Alabama's version of the UCC of what the legislative policy is ....
>
> ....
>
> These amendments [to the UCC] serve as an expression of public policy. ... We do believe ... that defendants who are ordinarily engaged in the business of marketing products should be liable for the foreseeable harm proximately resulting from defective conditions in the products which make them unreasonably dangerous.
>
> Such a policy is not unreasonable and is compatible with the policy of the legislature as demonstrated by the amendments to the UCC. We are of the opinion that the legislature has made manifest that policy of the state by expanding the UCC. ...
>
> Developing case law in accord with the announced public policy of the State has always been conceded to be a proper role for this Court.[81]

In short, "[w]hile the preferred method for modification of a rule of law is by legislative action, it is clearly within the power of the judiciary, and, at times, *appropriate for the judiciary*, to change an established rule of law," especially when three factors are present.[82] "First, the judiciary originally created th[e] rule of law," which "has not been altered, amended, or expanded upon by our legislative body."[83] Second, the judiciary may allow the common law to evolve when it involves "a tort law issue."[84] "An unjust tort law may indirectly affect every citizen of the state, but it will almost never directly affect enough people at any given point in time to generate a great deal of attention," making it unlikely "to ***377** be placed on the

Legislature's crowded agenda for consideration."[85] Third, the judiciary may allow the common law to evolve "when it has determined that a judicially created law is unjust in its application."[86]

Here, all three factors apply: (1) the Alabama Supreme Court created the comparison rule and the Alabama Legislature has declined to change it, (2) we are concerned with a tort law, and (3) not considering the effects of inflation on prior awards would allow the existing comparison rule to be unjustly applied in application.

Furthermore, a $10 million to $20 million award is well within the contemplation of the legislature, which imposed a cap on punitive damages in personal injury actions in the amount of "three times the compensatory damages."[87] The Alabama Supreme Court has also found a three-to-one ratio "presumptively reasonable."[88] Certainly, a personal injury case, depending on the circumstances, can warrant $15 million to $20 million in compensatory damages,[89] which would yield a $45 million to $60 million punitive damage award under a three-to-one multiplier. Death and paralysis should be considered similarly because victims in both situations lose the enjoyment of life. Opinions may differ on which is worse, but the analogy is a fair one. Over ten years ago, the United States Supreme Court declined to review a $55 million punitive damage award against Ford Motor Company to a paralyzed man whose compensatory damages were $18 million.[90] Therefore, it is safe to assume a punitive damage award for a death in this range is constitutionally sound.

***378 V. There Are No Judicial Caps of Wrongful Death Verdicts**

The fifth factor in applying the wrongful death comparison rule is recognizing that there is no fixed judicial cap on a wrongful verdict. Some defendants contend that the courts should ignore all Alabama Supreme Court decisions prior to the United States Supreme Court's 1996 decision in *BMW v. Gore*.[91] This argument is incorrect. The *BMW* decision combatted the notion that a case with small damage (there, a bad paint job) could produce millions of dollars of punitive damages. The *BMW* Court was not considering a wrongful death verdict. Nor is there any indication that the Alabama Supreme Court's review procedure for wrongful death cases, which has been utilized in the twenty-five years since *BMW*, would have produced a different result in *Burlington Northern Railroad Co. v. Whitt*,[92] *Atkins v. American Motors Corp.*,[93] and *General Motors Corp. v. Johnston*.[94] To the contrary, the *BMW* Court merely imposed the reprehensibility guidepost (which Alabama had already imposed) along with the two comparison guideposts referenced above, which the Alabama Supreme Court since has incorporated into its special procedure for reviewing awards for wrongful death. The Alabama Supreme Court has repeatedly held its review procedure complies with *BMW*,[95] so there is no basis to exclude pre-1996 decisions. In fact, the supreme court's 1992 decision in *Johnston* to reduce a $15 million wrongful death award to $7.5 million suggests that Alabama's review procedure, at least in wrongful death cases, was on track long before the United States Supreme Court decided *BMW*.

***379** Some defendants have relied on *Boudreaux v. Pettaway*[96] to assert that there is a de-facto $4 million judicial cap. Such an interpretation of *Boudreaux* is misplaced. First, four of the cases noted on the chart above exceeded $4 million prior to *Boudreaux*, even without considering inflation, and the award in *Robertson* exceeded $4 million three years after *Boudreaux*. Second, it was the *circuit* court that reduced the *Boudreaux* award to $4 million, not the Alabama Supreme Court.[97] Notably, the plaintiff did not cross-appeal the reduction, although she could have.[98] Third, in affirming the reduction, the *Boudreaux* court stated "no arbitrary cap can be placed on the value of human life."[99] Obviously, this is contrary to the notion that *Boudreaux* imposed a $4 million cap. Finally, the court has since held each case is unique, and an amount approved in one case does not control another,[100] which is also contrary to reading *Boudreaux* as establishing a cap.

Similarly, some defendants will rely on *Tillis Trucking Co. v. Moses*[101] and *Mobile Infirmary Ass'n v. Tyler*[102] for the proposition that only a $1 million to $3 million verdict is appropriate. Such arguments are also incorrect. The main reason the $7 million *Tillis Trucking* verdict was reduced to $1.5 million was because there was only $1.5 million in assets and insurance.[103] Furthermore, the *Boudreaux* court disregarded the *Tyler* remittitur of $5.5 million to $3 million because the *Tyler* opinion "did not include a recitation of the factors on which the remittitur was based."[104] Finally, *after* the holdings in *Tillis Trucking* and *Tyler*, the ***380** supreme court clarified in *Boudreaux* that the "sting not destroy" rule--which allows a court to reduce a punitive damage award solely because a defendant has insufficient means to pay--does not apply in wrongful death cases.[105] Therefore, *Tillis Trucking* and *Tyler* have minimal comparative value today.

Conclusion

Death is the end of all things on this Earth. The Alabama Supreme Court has recognized that the Alabama Legislature wanted a strong financial punishment for those that wrongly take a life, and the legislature left the appropriate amount of punishment for wrongfully causing a death to a jury. Juries are the "lungs of liberty,"[106] "the only anchor ... by which a government can be held to the principles of its constitution,"[107] and "an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or ... the judiciary."[108] Common law damage principles, indications from the Alabama Legislature, and plain common sense require that inflation be considered when comparing the value of anything over time. The amounts of wrongful death awards previously approved by the Alabama Supreme Court should not be treated differently than everything else.

Our tort system is consistent with limited government. Our tort laws do not require government regulators or enforcers, statisticians or bean counters. Our taxes do not have to be increased to make the tort system work because it largely finances itself. Our tort laws represent hundreds of years of the collective wisdom of justices that have served on our Alabama Supreme Court-- one of the oldest institutions in our nation devoted to safety and the public good. Our tort laws, including the Alabama Wrongful Death Act, also make the strong accountable to the weak. It is the poor and underprivileged that have to work the dangerous jobs, that have to live in unsafe apartments and nursing homes, and that ***381** have no choice but to receive services from the least "professional" professionals. It is no surprise they are the ones getting hurt and killed. The Alabama Wrongful Death Act protects them just as it protects the strong, the intelligent, the wealthy, and the resourceful. But if inflation is not considered when a defendant contends that a wrongful death award is too much, the punishments of our juries will be diluted, our strong, pro-life Wrongful Death Act will deteriorate over time, the value of a life will be diminished, and no one will be safe.

Footnotes

d1 B.A. (1995), Cumberland University; J.D. (1998), Cumberland School of Law, Samford University. Mr. Riley is a partner at Marsh, Richard & Bryan, P.C. in Birmingham, Alabama.

1 ALA. CODE § 6-5-410 (1975).

2 Estes Health Care Ctrs. v. Bannerman, 411 So. 2d 109, 113 (Ala. 1982).

3 Boudreaux v. Pettaway, 108 So. 3d 486, 497 (Ala. 2012) (emphasis added) (quoting Ala. Power Co. v. Turner, 575 So. 2d 551, 556 (Ala. 1991)) (internal quotation marks omitted); *see also* McKowan v. Bentley, 773 So. 2d 990, 999 (Ala. 1999) (per curiam) ("Alabama law does not impose specific limits on the amount that may be recovered in a wrongful death action.").

4 *Ala. Power Co.*, 575 So. 2d at 553.

[5] *Id*.

[6] *Id*.

[7] Bell v. Riley Bus Lines, 57 So. 2d 612, 615 (Ala. 1952) (holding that apportionment among tortfeasors is not available because the Wrongful Death Act does not allow specifically for apportionment).

[8] Geohagan v. Gen. Motors Corp., 279 So. 2d 436, 439 (Ala. 1973).

[9] Stinnett v. Kennedy, 232 So. 3d 202, 212 (Ala. 2016) (quoting Eich v. Town of Gulf Shores, 300 So. 2d 354, 358 (Ala. 1974)) (quoting Nettles v. Bishop, 266 So. 2d 260, 262 (Ala. 1972)) (internal quotation marks omitted).

[10] *Id*. at 212-13 (quoting *Eich*, 300 So. 2d at 356) (internal quotation marks omitted).

[11] Mazda Motor Corp. v. Hurst, 261 So. 3d 167, 196 (Ala. 2017) (quoting Campbell v. Williams, 638 So. 2d 804, 811 (Ala. 1994)) (internal quotation marks omitted).

[12] HARPER LEE, TO KILL A MOCKINGBIRD 209 (1960).

[13] Killough v. Jahandarfard, 578 So. 2d 1041, 1044 (Ala. 1991).

[14] *In re* Tylenol (Acetominophen) Mktg., Sales Practices & Prod. Liab. Litig. v. McNeill-PPC, Inc., 144 F. Supp. 3d 680, 697 (E.D. Pa. 2015) (interpreting Alabama law).

[15] *Stinnett*, 232 So. 3d at 213 (alteration in original) (quoting *Eich*, 300 So. 2d at 355).

[16] Indus. Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 818 (Ala. 1988).

[17] Ala. Power Co. v. Turner, 575 So. 2d 551, 556 (Ala. 1991).

[18] Tillis Trucking Co. v. Moses, 748 So. 2d 874, 891 (Ala. 1999) (per curiam).

[19] Boudreaux v. Pettaway, 108 So. 3d 486, 497 (Ala. 2012).

[20] *See, e.g.*, Gillis v. Frazier, 214 So. 3d 1127, 1134 (Ala. 2014) (holding a cap on damages in a wrongful death action is unconstitutional); *Boudreaux*, 108 So. 3d at 497 ("[T]he application of Alabama's wrongful-death statute denied the defendants neither due process nor equal protection of the law ...."); Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077, 1104-05 (Ala. 2007) (upholding the constitutionality of the wrongfuldeath act); Boles v. Parris, 952 So. 2d 364, 368 (Ala. 2006) (finding the award of punitive damages in a wrongful death action constitutional); Mobile Infirmary Med. Ctr. v. Hodgen, 884 So. 2d 801, 814 (Ala. 2003) (no cap for wrongful-death actions); *Tillis Trucking Co.*, 748 So. 2d at 891 (upholding wrongful-death damages); Lemond Constr. Co. v. Wheeler, 669 So. 2d 855, 863 (Ala. 1995) (finding Alabama's wrongful death statute constitutional); Smith v. Schulte, 671 So. 2d 1334, 1343-44 (Ala. 1995) (holding a cap on punitive damages in wrongful death action unconstitutional); Killough v. Jahandarfard, 578 So. 2d 1041, 1043-47 (Ala. 1991) (holding wrongful death act damages constitutional); Cent. Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 375-78 (Ala. 1989) (holding wrongful death act damages constitutional); *Indus. Chem. & Fiberglass Corp.*, 547 So. 2d at 818 (holding wrongful death act damages constitutional).

[21] Stinnett v. Kennedy, 232 So. 3d 202, 215 (Ala. 2016).

[22] Mazda Motor Corp. v. Hurst, 261 So. 3d 167, 196 (Ala. 2017).

[23] 274 U.S. 112 (1927).

[24] *Yeldell*, 274 U.S. at 114.

[25] *Id*. at 116.

[26] Boles v. Parris, 952 So. 2d 364, 368 (Ala. 2006).

[27] *Id*. at 368 n.6.

[28] ALA. CODE § 6-11-29 (2020).

[29] ALA. CODE § 6-11-21(j) (2020).

[30] S.B. 212, Reg. Sess. (Ala 2011).

[31] Mobile Infirmary Med. Ctr. v. Hodgen, 884 So. 2d 801, 814 (Ala. 2003).

[32] *Ex parte* Healthsouth Corp., 851 So. 2d 33, 41-42 (Ala. 2002).

[33] 517 U.S. 559 (1996).

[34] 539 So. 2d 218 (Ala. 1989).

[35] *See* Ala. River Group Inc. v. Conecuh Timber, Inc., 261 So. 3d 226, 271 (Ala. 2017) (citing several cases applying the

guideposts set in *BMW v. Gore* and *Green Oil Co. v. Hornsby*).

36 *BMW*, 517 U.S. at 575.

37 Ross v. Rosen-Rager, 67 So. 3d 29, 42 (Ala. 2010).

38 *Green Oil Co.*, 539 So. 2d at 223-24.

39 ALA. CODE § 6-11-23(b) (2020).

40 Roberson v. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010).

41 Ironically, such callous arguments by defendants, although not valid, are often helpful to the plaintiff's attorney because they are perhaps the greatest evidence of a defendant's continuing reprehensibility and callousness to human life. Some courts refer to such arguments as evidence of "secondary reprehensibility," a concept that courts have held allows a defendant's presentation of an overzealous defense to enhance a punitive damage award. *See* CGB Occ. Therapy, Inc. v. RHA Health Servs., Inc., 499 F.3d 184, 193-95 (3d Cir. 2007); Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677-78 (7th Cir. 2003); Cont'l Trend Res., Inc. v. OXY USA, Inc., 101 F.3d 634, 642 (10th Cir. 1996); Life Ins. Co. of Ga. v. Johnson, 684 So. 2d 685, 691 (Ala. 1996); Atkins v. Lee, 603 So. 2d 937, 948-49 (Ala. 1992); State Farm Fire & Cas. Ins. Co. v. Lynn, 516 So. 2d 1373, 1379 (Ala. 1987).

42 Boudreaux v. Pettaway, 108 So. 3d 486, 499 (Ala. 2012) (quoting Ala. Power Co. v. Turner, 575 So. 2d 551, 554 (Ala. 1991)) (internal quotation marks omitted); *see also* McKowan v. Bentley, 773 So. 2d 990, 999 (Ala. 1999) (per curiam) ("Alabama law does not impose specific limits on the amount that may be recovered in a wrongful death action.").

43 Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 316 (Ala. 2003).

[44] Mattison v. Kirk, 497 So. 2d 120, 124 (Ala. 1986).

[45] *Boudreaux*, 108 So. 3d at 498-99.

[46] Tillis Trucking Co. v. Moses, 748 So. 2d 874, 890 (Ala. 1999) (per curiam) (quoting Cherokee Elec. Coop. v. Cochran, 706 So. 2d 1188, (Ala. 1997)) (internal quotation marks omitted).

[47] BMW v. Gore, 517 U.S. 559, 575 (1996).

[48] *Tillis Trucking Co.*, 748 So. 2d at 890 (quoting *Cherokee Elec. Coop.*, 706 So. 2d at 1194) (internal quotation marks omitted).

[49] *Id*. (emphasis added).

[50] 224 So. 3d 150 (Ala. 2015) (unpublished table decision).

[51] Brief of Appellants at 45, Nineteenth St. Inv., Inc. v. Robertson, 224 So. 3d 150 (Ala. 2015) (unpublished table decision).

[52] Sabbah v. Robertson, 136 S. Ct. 1715 (2016) (mem.).

[53] Leon Neyfakh, *The I-word*, BOS. GLOBE (Aug. 28, 2011), http://archive.boston.com/news/politics/articles/2011/08/28/the_i_word.

[54] Bearden v. LeMaster, 226 So. 2d 647, 649-50 (Ala. 1969) (citing Magic City v. Tolbert, 41 So. 2d 619, 621 (Ala.

1949)).

55 *Id*.

56 Life Ins. Co. of Ga. v. Johnson, 725 So. 2d 934, 943 (Ala. 1998).

57 Boudreaux v. Pettaway, 108 So. 3d 486, 497 (Ala. 2012) (quoting Ala. Power Co. v. Turner, 575 So. 2d 551, 556 (Ala. 1991)) (internal quotation marks omitted).

58 *Id*. at 504 (emphasis added).

59 *Id*. at 497.

60 *See* King v. Nat'l Spa & Pool Inst., Inc., 607 So. 2d 1241, 1246-47 (Ala. 1992) ("The policy of the Wrongful Death Act is solely to protect human life by deterring tortious acts that result in death and impose civil punishment on those who take human life.").

61 *See CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 25, 2020).

62 Values compared to July 2020.

63 731 So. 2d 1204 (Ala. 1999).

64 *Lance*, 731 So. 2d at 1220-21.

65 *Id*. at 1221.

66 *Id*.

67 *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited July 27, 2020).

68 S.B. 137, 1999 Leg., Reg. Sess. (Ala. 1999) (codified as ALA. CODE § 6-11-21(f) (2020)).

69 ALA. CODE § 6-11-21(j) (2020); *see also id*. § 6-11-29 ("This article shall not pertain to or affect any civil actions for wrongful death.").

70 *See* Killough v. Jahandarfard, 578 So. 2d 1041, 1044 (Ala. 1991) ("The Legislature has elected to treat wrongful death tortfeasors differently from other tortfeasors ...."); Clardy v. Sanders, 551 So. 2d 1057, 1064 (Ala. 1989) (Maddox, J., concurring) ("[P]unitive damages in a wrongful death case ... are different in nature from punitive damages in any other type of tort action in Alabama.").

71 Tillis Trucking Co. v. Moses, 748 So. 2d 874, 890-91 (Ala. 1999) (per curiam); McKowan v. Bentley, 773 So. 2d 990, 998 (Ala. 1999) (per curiam); Cherokee Elec. Coop. v. Cochran, 706 So. 2d 1188, 1194 (Ala. 1997).

72 ALA. CODE § 6-11-21(e), (j) (1975).

73 *Id*. § 6-11-21(i).

74 *Ex parte* Brown, 83 So. 3d 512, 515 (Ala. 2011) (per curiam) (quoting *Ex parte* Meeks, 682 So. 2d 423, 428 (Ala.

1996)) (internal quotation marks omitted).

75 Ala. State Bd. of Health *ex rel*. Baxley v. Chambers Cty., 335 So. 2d 653, 656 (Ala. 1976) (citing Thompson v. State, 20 Ala. 54, 62 (1852)).

76 *Brown*, 83 So. 3d at 515 (quoting *Ex parte Meeks*, 682 So. 2d at 428) (internal quotation marks omitted).

77 NCNB Tex. Nat'l Bank v. West, 631 So. 2d 212, 227-28 (Ala. 1993) (quoting Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 294-95 (Pa. 1893)) (internal quotation marks omitted).

78 335 So. 2d 134 (Ala. 1976).

79 AM. L. PROD. LIAB. 3d § 16:13.

80 *Atkins*, 335 So. 2d at 142.

81 *Id*. at 141-42.

82 Lloyd v. Serv. Corp. of Ala., Inc., 453 So. 2d 735, 740 (Ala. 1984).

83 *Id*.

84 *Id*.

85 *Id*.

86 *Id*.

87 ALA. CODE § 6-11-21(d) (2020).

88 Prudential Ballard Realty Co. v. Weatherly, 792 So. 2d 1045, 1052 (Ala. 2000); S. Pine Elec. Coop. v. Burch, 878 So. 2d 1120, 1128 (Ala. 2003).

89 *See* Gutierrez v. Franklin, 173 So. 3d 720 (Ala. 2013) (unpublished table decision); Brief of the Appellee/Cross-Appellant at 2, Franklin v. Gutierrez, 173 So. 3d 720 (Ala. 2013) (unpublished table decision) ("The verdict was remitted by the circuit judge to $9M ....").

90 Ford Motor Co. v. Buell-Wilson, 130 S. Ct. 742 (2009); Buell-Wilson v. Ford Motor Co., 73 Cal. Rptr. 3d 277, 311 (Ct. App. 2008) (reducing the punitive damage award to $55 million).

91 517 U.S. 559 (1996).

92 575 So. 2d 1011 (Ala. 1990).

93 335 So. 2d 134 (Ala. 1976).

94 592 So. 2d 1054 (Ala. 1992).

95 *See* Boudreaux v. Pettaway, 108 So. 3d 486, 499 (Ala. 2012) ("[B]ecause the award of punitive damages in a

wrongful-death case is subject to a proportionality review, we are not inclined to revisit *Tillis Trucking*."); Tillis Trucking Co. v. Moses, 748 So. 2d 874, 890-91 (Ala. 1999) (per curiam) ("We see nothing in *BMW v. Gore* that should cause us to revisit the long-standing conclusion that the legislatively authorized action for wrongful death is intended to punish the wrong-doer and the longstanding rule that the phrase 'such damages as the jury may assess' is to be interpreted in light of that purpose.").

96 108 So. 3d 486 (Ala. 2012).

97 *Boudreaux*, 108 So. 3d at 488.

98 *Id.*; *see* ALA. R. CIV. P. 59(f) (providing that the plaintiff's acceptance of a judge's remittur does not bar that plaintiff from seeking the previous award's reinstatement).

99 *Boudreaux*, 108 So. 3d at 497 (quoting Ala. Power Co. v. Turner, 575 So. 2d 551, 556 (Ala. 1991)) (internal quotation marks omitted).

100 Pensacola Motor Sales, Inc. v. Daphne Auto.,LLC, 155 So. 3d 930, 946-97 (Ala. 2013).

101 748 So. 2d 874 (Ala. 1999) (per curiam).

102 981 So. 2d 1077 (Ala. 2007).

103 *Tillis Trucking Co.*, 748 So. 2d at 888 ("Given the undisputed liability coverage of $1,000,000 and the fact that the highest estimate of Tillis Trucking's worth is $500,000, it appears that the highest judgment the defendants could reasonably be expected to pay would be a judgment for $1,500,000.").

104 *Boudreaux*, 108 So. 3d at 504.

[105] *Id.* at 504-05.

[106] Statement of John Adams (1774).

[107] *The Papers of Thomas Jefferson, Mar. 27-Nov. 30, 1789*, at 266 (Julian P. Boyd ed., 1958).

[108] Parklane Hosier Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, C.J., dissenting) (citations omitted).

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